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PREFACE TO THE ORIGINAL EDITION

(*Abridged*).

OF the plan and principle of this work on the Laws of England, it may be right here to give some explanation. Though the celebrated Treatise of Blackstone still remains without a rival, the positions which it contains have been so trenched upon by modern alterations in the law, that if the student were to rely upon it, as containing an accurate account of our present system of jurisprudence, he would be sadly led astray. . . . But still the unimpaired portions of that Treatise comprise many passages, which (free in other respects from objection) are distinguished by all that grace of diction, justness of thought, and affluence of learning, to which the original author owed his fame; and any new Commentator on the Laws cannot hope to rival these excellences; and to displace or sacrifice them for original matter of his own, would be to do a serious injury to the public, and even to the law itself.

All passages, then, which appeared to me to fall under the above description I have retained; my deviations, nevertheless, have been frequent

and extensive; and it is seldom that I have been able to pursue the original text for several pages in succession, without the introduction of new matter from my own pen.

With respect to the general arrangement of the work, it is to be remarked that the order adopted by Blackstone is, in all its principal lineaments, derived from the Analysis of Hale; but though rendered venerable by the combined authority of names like these, I have not felt myself able to accede to it without one important alteration. The main division, indeed, by which the body of municipal law is severed into *Rights* and *Wrongs*, I have deemed it expedient to retain: for that division is founded on a natural and just distinction, and is interwoven in the whole fabric of our law; and the division also of Wrongs into those of a *civil*, and those of a *criminal* nature, I have, for similar reasons, thought it incumbent on me to preserve. But as to the division of *Rights*, the distribution of these by Blackstone into *Rights of Persons* and *Rights of Things*, is an arrangement which is contrary to both grammatical and logical propriety. For the rights of things can only be understood as signifying the rights *relating* to things—a sense not correctly conveyed by the form of expression; and are placed, besides, in false antithesis to the rights of persons,—by which is evidently intended the rights *belonging* to persons. The arrangement in

question is open, moreover, to other objections of a weightier description. For it determines that the law relating to *persons* shall be fully discussed before that relating to *property* has been examined,—and yet the subject of property ought, in reason, to take the precedence of at least that part of the law of persons which treats of relative rights(*a*). And another grave objection to the arrangement in question is, that it fails to embrace (or to duly embrace) the whole compass of rights; and it leaves, in fact, out of consideration, or gives but an awkward and incongruous place for the consideration of, a great and increasingly important branch of the law—that, namely, which concerns the social, as distinguished from the political, institutions of the country: *e. g.*, the laws relating to the poor and to highways are treated by Blackstone, under the pressure of this faulty arrangement, as mere incidents respectively to the offices of parish overseer and of parish surveyor.

(*a*) This did not escape the discernment of Hale: “Having done with the rights of persons, I now come to the rights of things. And though, according to the usual method of civilians and our antient common law tractates, this comes in the second place, after the *jura personarum*, and therefore I have herein pursued the same course, yet that must not be the method of a young student of the common law, but he must begin his study here, at the *jura rerum*; for the former part contains matter proper for the study of one that is well acquainted with those *jura rerum*.” Hale’s Anal. sect. 23. This passage had not attracted my attention until my principle of division had been fixed upon; and its subsequent discovery was of course calculated to give me increased confidence in the propriety of my choice.

Dissatisfied for these reasons with Blackstone's arrangement of rights, and conceiving that it had not become so inveterate among us as to render its retention unavoidable, I have ventured to lay it aside, and to adopt a different plan of distribution; which plan will be found stated at the commencement of Book I. of these Commentaries, its leading principle being to make the distinction between *Persons* and *Things* the foundation not of a primary, but of a subordinate arrangement, and to consider *Persons* as constituting the only primary objects of the law's regard.

But the persons, whom the law is supposed thus uniformly to contemplate, are presented, first, in the light of insulated individuals,—and in that capacity their *personal* (in other words their *bodily*) rights are examined; next, in their connection with the things around them,—which introduces the consideration of their rights of *property*; next, as members of families,—which involves their *rights in private relations*; and lastly, as members of the community,—which leads to the discussion of their rights in public relations, or (as they may be termed more compendiously) *public rights*. And, according to this order, the absolute right uniformly takes the precedence of the relative; the law of property in general is investigated before the relations of men, in regard to property, arise for consideration; and the consideration of *Public Rights* is conveniently sub-

divided into those, on the one hand, which concern a man in his relations to persons in authority,—whether civil or ecclesiastical; and into those, on the other hand, which concern him in his relations to his fellow citizens; and the entire plan of the Treatise may accordingly be synoptically exhibited as follows:—

I. OF PERSONAL RIGHTS.

II. OF RIGHTS OF PROPERTY.

1. As to things real.
2. As to things personal.

III. OF RIGHTS IN PRIVATE RELATIONS.

1. Between master and servant.
2. Between husband and wife.
3. Between parent and child.
4. Between guardian and ward.

IV. OF PUBLIC RIGHTS.

1. As to the civil government.
2. As to the church.
3. As to the social economy of the realm.

V. OF CIVIL INJURIES.

Including the modes of redress.

VI. OF CRIMES.

Including the modes of prosecution.

PREFACE

TO THE

TWELFTH EDITION.

I HAVE resolutely cut out of these Commentaries everything that has ceased to be of value ; and for the student's easier perusal of them, I have resolutely kept the text unbroken by statements in the foot-notes ; and I have brought down the Work to the present time, and revised and modernised it in every respect.

And in particular I have worked up the law of Real Property, so as to incorporate every provision of importance in the Conveyancing and Settled Land Acts and other Acts (including the Trustee Acts, 1893 and 1894, and the Married Women's Property Act, 1893), down to the end of the year 1894 ; and I have expounded (Vol. I., pp. 694—706) the Succession Duty, which, although of surpassing importance in actual business, had not been discussed in former issues ; and also the new Estate Duty, as imposed by the Finance Act, 1894 ; and I venture to affirm that the First Volume of these Commentaries now contains as complete an exposition of Real Property Law as

can be usefully expounded within the limits of this Work.

In that part of the Second Volume which treats of the Law of Personal Property, including Contracts, Wills, Bankruptcies, and the like, nothing has been omitted of the present existing law which can be conveniently included or which can be required of students to know and to master. And I have aimed, also, at securing the like completeness, and by the like methods, in the other portions of this Second Volume,—those, namely, which deal with the Relation of Master and Servant; the Law of Husbands and Wives; and the Laws relating respectively to Infancy and to Guardianship.

In those parts of the Third Volume which deal with Civil Injuries, and with the remedies therefor,—including Actions in the County Court and in the High Court, and other proceedings in the High Court and on Appeal therefrom,—I have (while adhering to the methods adopted in the previous Editions of these Commentaries) endeavoured to impart to the consideration of these Injuries and Remedies such a character as tends to make the perusal thereof interesting as well as useful. But I have not felt justified in leaving out in this Edition anything which has heretofore been found useful.

As regards the law of Public Rights, that is to

say, the political constitution and social economy of the realm—subjects which occupy in these Commentaries the better part of the Second Volume, and the first 200 pages (or so) of the Third Volume—different considerations, of course, have weighed with me. For much of this law—the political part thereof especially—is (and remains) of historical value only, and has not permitted of any alteration or amendment. Nevertheless, in all those parts of it which treat of Corporations (including Municipal bodies, and County and Parish Councils); or which treat of the Poor, and of Education, and of Lunatic Asylums, Prisons, and the like; or of Friendly Societies, and of Savings Banks and other Banks, or of Charities; or of Highways and Bridges, and of Ships, and of Public-houses, or generally of the Public Health and Welfare,—I have endeavoured to give to the student such an exposition thereof as shall qualify him (in his after-practice) to steer through all these multitudinous laws, with equal intelligence and safety and with comparative readiness. And as regards the Chapter on Professions—dealing with the Medical Profession in all its branches, and with Solicitors and Counsel—I have been able to make that Chapter reasonably complete.

Lastly, as regards the Criminal Law and Criminal Procedure—being the subject-matter of the Fourth Volume of these Commentaries—I have

been averse to greatly altering the previous editions in respect thereof. But they have, happily, wanted no alteration, save only in minor matters, and save by the addition of the criminal provisions of certain recent statutes which are of a general importance to us all.

I have with my own hand done the Index at the end of each of the first three volumes, and also the General Index at the end of the fourth, or concluding volume, and I believe that these Indexes will now enable the student and practitioner to find, with certainty and with readiness, every detail in the Treatise. And as regards the Table of Statutes, I have exercised such supervision over its preparation and printing as will, I believe, be found to have secured its accuracy and completeness.

It is with regret that I have to record the death of his Honour Judge Stephen whilst this Edition was in the press, and, indeed, almost on the point of publication.

A. BROWN.

8, NEW SQUARE,
LINCOLN'S INN, W.C.,
April, 1895.

CONTENTS OF THE WORK.

VOLUME I.

Introduction.

	PAGE
SECT. I.—Of the Study of the Law	1
II.—Of the Nature of Laws in general	19
III.—Of the Laws of England	38
IV.—Of the Countries subject to the Laws of England ..	82
V.—Of the Kingdom of England itself	117

Book I.

OF PERSONAL RIGHTS.

Of Rights and Wrongs	137
Of the general Arrangement of the Work	140
Of the Right of Personal Security	141
Of the Right of Personal Liberty	147

Book II.

OF RIGHTS OF PROPERTY.

As to Property in general	154
-----------------------------------	-----

PART I.

OF THINGS REAL	167
------------------------	-----

CHAP. I.

OF THE DIVISIONS OF THINGS REAL.

Of Lands, Tenements, and Hereditaments	168
Of Hereditaments, Corporeal or Incorporeal	170

CHAP. II.

OF TENURES.

	PAGE
Of the Feudal System	172
Of the Introduction of that System into England	180
Of the Nature of Tenure	184
Of the different sorts of Tenure	185
Of Knight's Service	187
Of Free Socage and its Incidents	203
Of Free Socage, Tenure in Burgage, and Gayelkind	208
Of Manors	211
Of Villenage	212
Of Copyhold	216
Of Ancient Demesne	220
Of Customary Freehold	222
Of Tenure in Frankalmoin	<i>ibid.</i>

CHAP. III.

OF FREEHOLD ESTATES OF INHERITANCE.

Of Estate	225
Of Legal and Equitable Estate	226
Of Freehold Estate	<i>ibid.</i>
Of a Fee	227
Of Estates in Fee Simple	229
Of the Statute of <i>Quia Emptores</i>	<i>ibid.</i>
Of Fee Simple Absolute, Base, and Conditional	233
Of Estates Tail	236

CHAP. IV.

OF FREEHOLD ESTATES NOT OF INHERITANCE.

Of Estates for Life, created by Act of Parties	249
Of Tenant in Tail after Possibility of Issue Extinct	256
Of Estate by the Curtesy of England	257
Of Dower	260
Of Jointure	265

CHAP. V.

OF ESTATES LESS THAN FREEHOLD.

Of the Distinction between Chattels and Freehold	272
Of Estates for Years	273
Of <i>Interest Termini</i>	279
Of Tenancies from Year to Year	280
Of Estates at Will	283
Of Estates at Sufferance	284
Of Terms held in Trust to attend the Inheritance	286
Of Enlargement of Long Terms into Fees	288

CHAP. VI.

OF ESTATES UPON CONDITION.

	PAGE
Of Estates on Condition implied in Law	290
Of Estates granted on Express Condition, whether precedent or subsequent .. .	291
Of Conditional Limitation .. .	292
Of Conditions Impossible, Contrary to Law, or Repugnant ..	294
Of the Right of Entry on Breach of Condition subsequent ..	295
Of Waiver of Forfeiture .. .	<i>ibid.</i>
Of <i>Vivum Vadium</i> .. .	296
Of Mortgage .. .	297
Of Estates by Statute Merchant and Statute Staple .. .	301
Of Estate by Elegit .. .	302

CHAP. VII.

OF ESTATES IN POSSESSION, REVERSION, AND REMAINDER.

Of an Estate in Possession .. .	305
Of Right of Possession and Right of Entry .. .	<i>ibid.</i>
Of an Estate in Reversion .. .	306
Of Merger .. .	309
Of an Estate in Remainder .. .	311
Of the Rules as to the Creation of Remainders .. .	313
Of Vested and Contingent Remainders .. .	315
Of the Rules relative to Contingent Remainders .. .	318
Of Defeating Contingent Remainders .. .	319
Of Trustees to preserve Contingent Remainders .. .	321
Of Strict Settlement .. .	<i>ibid.</i>
Of the Rule in Shelley's Case .. .	323
Of Reversionary Interests .. .	325

CHAP. VIII.

OF ESTATES IN SEVERALTY, JOINT TENANCY, COPARCENARY, AND COMMON.

Of an Estate in Severalty .. .	327
Of an Estate in Joint Tenancy .. .	328
Of an Estate in Coparcenary .. .	335
Of Tenancy in Common .. .	339
Of Cross Remainders .. .	342

CHAP. IX.

OF USES AND TRUSTS.

	PAGE
Of the Origin of Uses and Trusts	344
Of the Doctrine of Uses prior to the Statute of Uses	345
Of the Statute of Uses	352
Of the Doctrine of Uses and Trusts since the Statute	353
Of the different kinds of Trusts	357
Of the Estate of the Trustee	359
Of the Estate of <i>certain que Trust</i>	361
Of modern Statutes as to Trust Estates	363

CHAP. X.

OF TITLE IN GENERAL.

Of Title by Act of Law	365
Of Title by Purchase	366

CHAP. XI.

OF TITLE BY DESCENT.

Of the Nature of the Heir's Title in general	368
Of the Inheritance Act, 3 & 4 Will. 4, c. 106	369
Of tracing Descent from the Purchaser	370
Of the Maxim <i>Seisina facit Stipitem</i>	377
Of Descent to the Issue	378
Of the Preference of Males to Females	<i>ibid.</i>
Of Primogeniture	380
Of Representation	382
Of Descent to Lineal Ancestors	385
Of the Preference of the Paternal Line to the Maternal	388
Of the Descent to the Issue of Lineal Ancestors	389
Of Whole and Half Blood	391
Of certain special Cases of Descent	397
Of the Mode of tracing and ascertaining the Heir	399
Of Entry by the Heir	402
Of Breaking the Descent	<i>ibid.</i>
Of the Liability of the Heir for the Debts of the Ancestor	403

CHAP. XII.

OF TITLE BY ESCHEAT.

Of the Nature and Principle of Escheat in general	407
Of Escheats <i>propter Defectum Sanguinis</i>	408
Of Monsters	409
Of Bastards	<i>ibid.</i>
Of Aliens taking by Descent	411

CHAP. XII.—(*continued.*)

	PAGE
Of Escheats <i>propter Delictum Tenentis</i>	413
Of Attainder	<i>ibid.</i>
Of Corruption of Blood	<i>ibid.</i>
Of Forfeiture in case of Trust and Mortgage Estates	417
Of Remissions of Forfeitures	<i>ibid.</i>

CHAP. XIII.

OF TITLE BY OCCUPANCY.

Of the Nature and Principle of the Title by Occupancy	419
Of the Application of it to Estates <i>pur Autre Vie</i>	<i>ibid.</i>
Of Special Occupancy	420
Of <i>quasi</i> Entail	421
Of certain Enactments as to Estates <i>pur Autre Vie</i>	<i>ibid.</i>
Of Alluvion and Dereliction	422

CHAP. XIV.

OF TITLE BY FORFEITURE.

Of Alienation in Mortmain	425
Of Gifts to Charitable Uses	432
Of Alienation by particular Tenants	436
Of Disclaimer	438

CHAP. XV.

OF TITLE BY ALIENATION IN GENERAL.

Of the Antient Law as to Alienation	439
Of the Present Law on the subject	442
Of those Persons who may convey or take by Purchase	444
Of Alienation by Persons attainted	<i>ibid.</i>
Of Alienation by Corporations	<i>ibid.</i>
Of Alienation by Idiots and Insane Persons	446
Of Alienation by Infants	447
Of Alienation by Married Women	448
Of Alienation by Aliens	449
Of the way in which a Man may alien	452

CHAP. XVI.

OF DEEDS.

Of the Nature of Deeds	453
Of Indentures	454
Of Deeds-poll	<i>ibid.</i>
Of the Requisites of Deeds	455
Of the Parties	456

CHAP. XVI.—(*continued.*)

	Page
Of the Premises	456
Of the <i>Habendum</i> and <i>Tenendum</i>	457
Of the <i>Reddendum</i>	458
Of Conditions	459
Of Warranty	<i>ibid.</i>
Of Covenants	461
Of the Conclusion and Date	462
Of Reading the Deed	<i>ibid.</i>
Of Sealing	463
Of Signing	<i>ibid.</i>
Of Delivery	465
Of the Attestation	466
Of the Avoidance of Deeds	467
Of the Consideration	468
Of Voluntary Conveyances	<i>ibid.</i>
Of the Rules for Construction of Deeds	469

CHAP. XVII.

OF ORDINARY CONVEYANCES—AND, FIRST, OF THOSE AT THE
COMMON LAW.

Of the different kinds of Conveyances	472
Of a Feoffment	473
Of Freeholds by wrong	477
Of Disseisin, and displacing Reversions and Remainders ..	478
Of a Grant	<i>ibid.</i>
Of lying in Grant and lying in Livery	479
Of Attornment	<i>ibid.</i>
Of a Lease	<i>ibid.</i>
Of Agreements to Let	480
Of the Relief of Lessees	482
Of an Exchange	<i>ibid.</i>
Of a Partition	484
Of a Release	<i>ibid.</i>
Of a Confirmation	488
Of a Surrender	<i>ibid.</i>
Of an Assignment	491
Of a Defeasance	493
Of a Lease and Release	494

CHAP. XVIII.

OF CONVEYANCES UNDER THE STATUTE OF USES.

Of the Principle of a Conveyance under the Statute of Uses ..	495
Of a Feoffment to Uses	498
Of a Covenant to stand Seised to Uses	<i>ibid.</i>

CHAP. XVIII.—(*continued.*)

	PAGE
Of a Bargain and Sale	499
Of a Lease and Release	502
Of a Grant to Uses	503
Of Limitations to Uses in general	504
Of Uses <i>in Futuro</i>	509
Of Powers	511
Of Perpetuities	514
Of Accumulations	516

CHAP. XIX.

OF CONVEYANCES BY TENANTS IN TAIL AND MARRIED WOMEN.

Of the Former Modes of Proceeding by way of Fine and Recovery	518
Of the Substitutes provided by the Fine and Recovery Act	533
Of Disentailing Deeds	533
Of Deeds Acknowledged	539

CHAP. XX.

OF THE CONVEYANCE BY DEVISE.

Of Devises generally	543
Of the Power of Devising	545
Of the Solemnities required	549
Of the Construction of Devises	554
Of the Operation of Devises in Conveying Real Estate	562

CHAP. XXI.

OF EXTRAORDINARY CONVEYANCES,—OR THOSE BY MATTER OF RECORD.

Of Private Acts of Parliament	565
Of Royal Grants	567

CHAP. XXII.

OF COPYHOLDS.

Of the Nature of Copyholds in general.. .. .	573
Of Waste, Quit Rents, Fines, and Heriots	576
Of the Liability of Copyholds to Debts	579
Of the Enfranchisement of Copyholds	580
Of Alienation of Copyholds	581
Of Surrender	582
Of Admittance	584
Of Devises of Copyholds	588
Of the Conveyance of Entailed Copyhold Estates	589

CHAP. XXII.—(*continued.*)

	PAGE
Of the Conveyance of Copyholds by Married Women	590
Of the Conveyance of Equitable Estates in Copyholds	<i>ibid.</i>
Of the Copyhold Act, 1894, for Improvement of the Tenure and facilitating Enfranchisement	591

CHAP. XXIII.

OF INCORPOREAL HEREDITAMENTS.

Of Incorporeal Hereditaments in general	595
Of Commons	596
Of Ways	604
Of Watercourses	606
Of Lights	607
Of Franchises	608
Of Rents	617
Of the Law of Incorporeal Hereditaments, generally considered	625
Of Prescription	628
Of Prescription at Common Law	629
Of Prescription under 2 & 3 Will. 4, c. 71	634
Of the Extinction of Incorporeal Hereditaments	637
Of the Abandonment of Lights and Watercourses	638

CHAP. XXIV.

OF THE CONVEYANCING AND LAND ACTS, 1881—1892.

Of the Conveyancing Acts, 1881 to 1892	639
Of the Settled Land Acts, 1882 to 1890	656

CHAP. XXV.

OF REGISTRATION OF TITLE TO LAND.

Of Registration generally	680
Of the Land Transfer Act, 1875	683
Of the Lands Charges, &c. Act, 1888	688
Of Official Certificates of Searches	690
Of the Declaration of Title Act, 1862	692

CHAP. XXVI.

OF THE DEATH DUTIES ON LAND.

Of the Succession Duty	695
Of the Estate Duty	699
Of the Settlement Estate Duty	705

VOLUME II.



Book II.

OF RIGHTS OF PROPERTY—continued.



PART II.

	PAGE
OF THINGS PERSONAL	1

CHAP. I.

OF THINGS PERSONAL IN GENERAL AND OF PROPERTY THEREIN.

Of Chattels Personal	2
Of Moveables	3
Of Animals <i>Feræ Naturæ</i>	4
Of Property in Possession and in Action	7
Of Absolute and Qualified Property	8
Of Interests by way of Remainder in Chattels Personal	10
Of Joint Tenancy and Tenancy in Common in Chattels Personal	11
Of Equitable Interests in Chattels Personal	12

CHAP. II.

OF TITLE TO THINGS PERSONAL; AND, FIRST, OF TITLE BY OCCUPANCY.

Of Title by Occupancy	13
Of Hostile Capture	14
Of the Law relating to Game	15
Of Title by Accession	19
Of Title by Confusion or Intermixture	21

CHAP. III.

OF TITLE BY INVENTION.

	PAGE
Of Patent Rights	23
Of Copyright	34
Of Trade Marks and Trade Names	43
Of Designs	45

CHAP. IV.

OF TITLE BY GIFT, AND BY ASSIGNMENT.

Of the Alienability of Personal Property	49
Of the Transfer of Choses in Action	51
Of a Gift	52
Of <i>Donatio Mortis Causâ</i>	53
Of Assignment, or Bargain and Sale	54
Of Fraudulent Gifts and Assignments	55
Of the Transfer of Coin and Negotiable Instruments	57

CHAP. V.

OF TITLE BY CONTRACT.

Of Promises	59
Of Specialty and Simple Contracts	<i>ibid.</i>
Of Contracts written and verbal, and of the Statute of Frauds	<i>ibid.</i>
Of Contracts express and implied	61
Of Contracts executed and executory	62
Of the Consideration of a Promise	63
Of the Construction or Interpretation of Contracts	67
Of the Performance of Contracts	68
Of Conditions Precedent	69
Of the Law of Principal and Agent	70
Of the Contract of Sale	73
Of the Transmutation of Property	74
Of the Sale of Goods Act, 1893	76
Of Stoppage <i>in Transitu</i>	77
Of Sales in Market Overt	78
Of Implied Warranties on Sales	81
Of the Maxim of <i>Caveat Emptor</i>	82
Of Express Warranties on Sales	83
Of Factors and Brokers	84
Of the Contract of Bailment	87
Of Special Property in Bailees	89
Of the Lien of Bailees	<i>ibid.</i>

CHAP. V.—(*continued.*)

	PAGE
Of Common Innkeepers	90
Of Common Carriers	92
Of the Contract of the Loan of Money	96
Of Bottomry and Respondentia	98
Of Life Annuities	99
Of Interest generally	101
Of the Contract of Partnership	103
Of the Contract of Guarantee	109
Of Bonds	112
Of Contracts secured by Penalties in general	115
Of Bills of Exchange and Promissory Notes	117
Of Policies of Insurance	131
Of Charter-parties	142
Of Debt and Damages	145
Of Debts of Record	146
Of Debts on Penal Statutes	<i>ibid.</i>
Of Debts by mere privity of Estate	147

CHAP. VI.

OF TITLE BY BANKRUPTCY.

Of the History of the Bankrupt Law	148
Of the Persons who may become Bankrupt	151
Of the Circumstances under which, and of the Manner in which, a Man may be adjudicated a Bankrupt	154
Of the Effect of the Bankruptcy on the Property of the Bankrupt ..	159
Of the Proceedings subsequent to Adjudication	171
Of Composition and Schemes of Arrangement	182

CHAP. VII.

OF TITLE BY WILL AND BY ADMINISTRATION.

Of acquiring Personal Estate by Will, and by Administration ..	188
Of the original State of the Law as to bequeathing Personalty ..	189
Of the Law of <i>Pars Rationabilis</i>	<i>ibid.</i>
Of the present Power of bequeathing Personalty	190
Of the Ecclesiastical Jurisdiction over Wills and Administrations ..	191
Of the Capacity to be Testator	194
Of the Solemnities of Wills	196
Of the Appointment of an Executor	197
Of Probate	198
Of the Grant of Administration	200
Of Administration <i>cum testamento annexo</i>	203

CHAP. VII.—*(continued).*

	PAGE
Of Administration <i>durante minore etate, durante absentia, and pendente lite</i>	204
Of Administration <i>de bonis non</i>	<i>ibid.</i>
Of limited or special Administration	205
Of the Representative Character of Executors and Administrators ..	<i>ibid.</i>
Of an Executor <i>de son tort</i>	206
Of the Duties of Executors and Administrators	207
Of proving the Will	<i>ibid.</i>
Of paying Estate Duty	208
Of making Inventory and collecting the Assets	<i>ibid.</i>
Of Payment of the Debts	209
Of the Protection of the Executor	211
Of Legacies	<i>ibid.</i>
Of Specific Legacies	212
Of Abatement of Legacies	<i>ibid.</i>
Of Ademption of Legacies	213
Of Lapsed Legacies	<i>ibid.</i>
Of Contingent Legacies	<i>ibid.</i>
Of the Residue	214
Of the Statute of Distributions	215
Of bringing into Hotchpot	217
Of the former Customs of London and York as to Distributions	218
Of the Intestates' Estates Act, 1890	219

CONCLUSION TO BOOK II.

OF SOME MIXED OR IRREGULAR SUBJECTS OF PROPERTY.

Of Emblements	220
Of Fixtures	222
Of the Agricultural Holdings Act, 1883	227
Of Shares of Public Undertakings connected with Land ..	228
Of Animals <i>Feræ Naturæ</i> passing with the Inheritance	229
Of Charters, Deeds, Family Pictures, and Monuments	<i>ibid.</i>
Of Heirlooms	230
Of the Settled Land Act, 1882	232



Book III.

OF RIGHTS IN PRIVATE RELATIONS.



CHAP. I.

OF MASTER AND SERVANT.

	PAGE
Of the Rights of Persons in their Private Relations	233
Of the State of Slavery	234
Of Servants	<i>ibid.</i>
Of Labourers	235
Of Apprentices	237
Of the Law of Master and Servant, as regards each other ..	239
Of the Law of Master and Servant, as regards Strangers	241

CHAP. II.

OF HUSBAND AND WIFE.

Of Marriage as a Contract	246
Of Canonical and Civil Disabilities affecting Marriage	247
Of the Prohibited Degrees of Relationship	249
Of the Marriage Acts	252
Of the Foreign Marriages Act, 1892	264
Of the Legal Identity between Husband and Wife	265
Of the Husband's Power over the Wife's Person	267
Of the Effect of the Marriage on her Property	268
Of the Married Women's Property Acts, 1882, 1893.. .. .	270
Of the Legal Disabilities of Married Women	273
Of the Legal Privileges and Protections of Married Women ..	275
Of the Manner in which the Legal Effects of Marriage are modified in Equity	277
Of Marriage Settlements	280
Of Separation Deeds	282
Of Divorce	283
Of Judicial Separation	285
Of Alimony	287
Of Nullity of Marriage	288

CHAP. III.

OF PARENT AND CHILD.

	PAGE
Of Legitimacy	289
Of Proof of Non-access	290
Of the <i>ultimum Tempus pariendo</i>	291
Of the Writ <i>de l'entre inspiciendo</i>	292
Of the Duties of Parents towards their Children	293
Of the Power of Parents over their Children	297
Of Bastards	300
Of the Legal Disabilities of Bastards	302

CHAP. IV.

OF GUARDIAN AND WARD.

Of Infancy	305
Of the Age of Legal Capacity in different Cases	<i>ibid.</i>
Of the Capacities and Incapacities of Infants	306
Of Guardianship by Nature	309
Of Guardianship for Nurture	310
Of Guardianship in Socage	<i>ibid.</i>
Of Guardianship by Statute	311
Of Guardianship by Election	<i>ibid.</i>
Of Guardianship by Appointment of the High Court of Justice	<i>ibid.</i>
Of Statutes for Protection of Children	313
Of Guardianship <i>ad Litem</i>	<i>ibid.</i>
Of Guardianship by Custom	314
Of the Rights and Duties of Guardians in general	<i>ibid.</i>



Book IV.

OF PUBLIC RIGHTS.



PART I.

	PAGE
OF THE CIVIL GOVERNMENT	317

CHAP. I.

OF THE PARLIAMENT.

Of the Origin and History of Parliament	318
Of the Manner and Time of Parliament's assembling	321
Of the Frequency with which Parliaments are to be held	322
Of the Constituent Parts of Parliament	324
Of the House of Lords	326
Of the House of Commons	329
Of the Law and Custom of Parliament	331
Of the Privileges of Parliament	335
Of the Laws and Customs relating to the House of Lords in particular	339
Of the Laws and Customs relating to the House of Commons in particular	341
Of the Raising of Taxes	<i>ibid.</i>
Of Money Bills	342
Of the Election of Members of the House of Commons	<i>ibid.</i>
Of the Qualifications of Electors in general	343
Of the Qualifications of Electors for Counties	344
Of the Qualifications of Electors for Boroughs	352
Of the Disqualifications of Electors	360
Of the Persons who may be elected Members	362
Of issuing the Writs for Election	366
Of the Election by Ballot	368
Of the Elections for the Universities	369
Of the Removal of Soldiers from the Place of Election	371
Of Corrupt and Illegal Practices	372
Of the Return	376

CHAP. I.—[continued.]

	PAGE
Of Controversied Elections	377
Of Vacating a Seat in Parliament	379
Of the Speaker of the Lords, and of the Commons	380
Of the Manner in which Bills are passed	381
Of the Adjournment, Prerogation, and Dissolution of Parliament..	388
Of the Triennial and Septennial Acts	392

CHAP. II.

OF THE SOVEREIGN, IN HIS GENERAL RELATION TO THE PEOPLE ;
AND THE LAW OF SUBJECT AND ALIEN.

Of the Original Contract between the Sovereign and the People ..	394
Of the Sovereign's Duty to govern according to Law	<i>ibid.</i>
Of the Coronation Oath	396
Of Allegiance	400
Of Natural-born Subjects	405
Of Aliens	406
Of Denizens	408
Of Persons naturalized	409
Of Naturalization Acts	410

CHAP. III.

OF THE ROYAL TITLE.

Of the hereditary Succession to the Crown	411
Historical View of the Successions that have taken place ..	415
Of the Exclusion Bill	430
Of the Revolution of 1688	431
Of the Act of Settlement.. .. .	434

CHAP. IV.

OF THE ROYAL FAMILY.

Of the Queen Regnant	437
Of the Privileges of the Queen Consort	<i>ibid.</i>
Of the Husband of a Queen Regnant	441
Of a Queen Dowager	442
Of the Prince of Wales and his Consort, and the Princess Royal ..	<i>ibid.</i>
Of the Royal Family	444
Of the Royal Marriage Act	447

CHAP. V.

OF THE ROYAL COUNCILS, AND OF THE OFFICERS OF STATE.

	PAGE
Of the Councils belonging to the Sovereign	448
Of the Right of Audience	449
Of the Privy Council	450
Of the Cabinet	451
Of the Judicial Committee	454

CHAP. VI.

OF THE ROYAL PREROGATIVE.

Of the Limitation of the Royal Authority	457
Of Political or Civil Liberty	459
Of the Free Administration of the Law in the Courts of Justice ..	464
Of the Independence of the Judges	465
Of the Right of Petitioning the Crown	466
Of the Nature of the Royal Prerogative	467
Of the Sovereign's Pre-eminence	468
Of his Freedom from Civil Disabilities	469
Of the Maxim that the King never dies	470
Of the Maxim that the King can do no wrong	<i>ibid.</i>
Of the Manner of avoiding the Royal Grant	471
Of Parliamentary Remonstrance against the Acts of the Sovereign	472
Of Parliamentary Impeachment of his Advisers	473
Of the Bar of his Rights by Lapse of Time	474
Of his Right of Embassy to Foreign States, and of the Law of Ambassadors	476
Of his Right to make Treaties	482
Of his Right to make War and Peace	483
Of his Right to issue Letters of Marque and Reprisal	484
Of his Right to grant Safe-Conducts	486
Of his Right to reject Laws	488
Of his Right to raise and regulate Armies and Fleets	489
Of his Right to appoint Ports and Havens	490
Of his Right to erect Beacons, Lighthouses, and Sea-marks ..	493
Of his Right to prohibit the Importation or Exportation of Arms, &c.	494
Of his Right to confine his Subjects to the Realm, and to recall them to the Realm	<i>ibid.</i>
Of his Right of erecting Courts of Judicature	496
Of his Right of pardoning Offences	497
Of his Right of issuing Proclamations	498

CHAP. VI.—(*continued.*)

	PAGE
Of his Right as Guardian of Idiots and Lunatics, and of the Law relating to them	500
Of his Right as the Fountain of Honour, Office, and Privilege..	505
Of his Right to establish Markets and Fairs	507
Of his Right to regulate Weights and Measures	508
Of his Right to stamp and regulate the Current Coin	513
Of his Rights as Head of the Church	517

CHAP. VII.

OF THE ROYAL REVENUE.

Of the Exchequer	521
Of the ordinary Revenue of the Crown	522
Of the Custody of the Temporalities of Bishops	523
Of the First Fruits and Tenths; and herein of the King's Books, and of Queen Anne's Bounty	524
Of the Demesne Lands of the Crown	527
Of the Antient Revenue from Purveyance and Pre-emption, and the Revenue given in Compensation for it	530
Of Profits from Forests	531
Of Profits from Courts of Justice	532
Of Royal Fish, Wrecks, Treasure-trove, Waifs, and Estrays ..	533
Of Royal Mines	542
Of Forfeitures and Deodands	544
Of the Extraordinary Revenue of the Crown	546
Of the Land-tax	547
Of the Customs	553
Of the Excise	557
Of the Assessed Taxes	560
Of the Post Office	561
Of the Stamp Duties	564
Of the Duty on Offices and Pensions	569
Of the Income Tax	<i>ibid.</i>
Of the National Debt	571
Of the Public Funds	573
Of the Consolidated Fund and the Public Income	575
Of the Civil List	576

CHAP. VIII.

OF THE ROYAL FORCES.

Of the History and Progress of our Military System	579
Of the Former and Present Military Force	581
Of the Militia	583

CHAP. VIII.—(*continued.*)

	PAGE
Of the Yeomanry and other Volunteers	584
Of the Regular Army	585
Of the Army Reserve.. .. .	<i>ibid.</i>
Of the Navy	589
Of the Naval Reserve.. .. .	590
Of the Royal Marines	592
Of the Power of the Crown in Modern, as compared with Antient Times	593

CHAP. IX.

OF THE NOBILITY AND OTHER RANKS.

Of the Degrees of Nobility	596
Of the Commonalty	607
Of Precedence generally	611

CHAP. X.

OF MAGISTRATES AND OTHER PUBLIC OFFICERS.

Of the Nature of Offices in general	615
Of the Sheriff	618
Of the Deputy Sheriff	626
Of the Under Sheriff	627
Of Bailiffs	628
Of the Coroner.. .. .	629
Of the Justices of the Peace	638
Of Constables	647



PART II.

	PAGE
OF THE CHURCH	656

CHAP. I.

OF THE ECCLESIASTICAL AUTHORITIES.

Of the Clergy generally	657
Of Archbishops and Bishops	661
Of Deans and Chapters	671
Of Archdeacons	673
Of Rural Deans	<i>ibid.</i>
Of Rectors and Parsons	674
Of Lay Appropriators	675
Of Vicars	676
Of Perpetual Curates	679
Of Sinecure Rectors	<i>ibid.</i>
Of Presentation	681
Of Institution	682
Of Collation	<i>ibid.</i>
Of Induction	683
Of Donatives	<i>ibid.</i>
Of Residence	685
Of Pluralities	688
Of holding in <i>Commendam</i>	689
Of Curates	691
Of Churchwardens	693
Of Church Rates	695
Of Parish Clerks	697
Of Sextons and Beadles	698

CHAP. II.

OF THE DOCTRINES AND WORSHIP OF THE CHURCH, AND HEREIN OF THE LAWS AS TO HERESY AND NONCONFORMITY.

Of the Articles of Faith	699
Of the Liturgy	700
Of the Crown's Supremacy	701
Of Nonconformity	702
Of Toleration	704

CHAP. III.

OF THE ENDOWMENTS AND PROVISIONS OF THE CHURCH.

	PAGE
Of Ecclesiastical Property in General	708
Of Glebe	710
Of Advowsons	711
Of Lapse	713
Of Simony	715
Of Tithes	717
Of Commutation of Tithes	724
Of the Estates which Ecclesiastical Persons may hold	727
Of Alienation of Ecclesiastical Property	728
Of Surplice Fees, Easter Offerings, and Mortuaries	734

CHAP. IV.

OF NEW ECCLESIASTICAL DISTRICTS AND PARISHES, AND OTHER
EXTENSIONS OF THE ORIGINAL CHURCH ESTABLISHMENT.

Of Parish Churches	738
Of Chapels	739
Of the Church Building Acts	741
Of the New Parishes Acts	744

VOLUME III.

Book IV.

OF PUBLIC RIGHTS—*continued.*

PART III.

	PAGE
OF THE SOCIAL ECONOMY OF THE REALM ..	1

CHAP. I.

OF THE LAWS RELATING TO CORPORATIONS.

Sect. 1.—*Of Corporations in General.*

Of Corporations Aggregate and Sole	4
Of Corporations Ecclesiastical and Lay	5
Of Corporations Civil and Eleemosynary	<i>ibid.</i>
Of the Creation of Corporations	7
Of the Incidents of Corporations	11
Of Qualified Corporations	17
Of Incorporated Companies	18
Of the Visitation of Corporations	25
Of Hospitals	26
Of Colleges in the Universities	27
Of the Dissolution of Corporations	28

Sect. 2.—*Of Municipal Corporations, and of County Councils and Parish Councils.*

Of Municipal Corporations	31
Of the Borough Council	35
Of County Councils	40
Of Parish Councils and Parish Meetings	50

CHAP. II.

OF THE LAWS RELATING TO THE POOR.

	PAGE
Of the Overseers of the Poor	56
Of Settlement, Relief, and Removal	57
Of Gilbert's Act	59
Of the Select Vestry Act	<i>ibid.</i>
Of the Poor Law Amendment Act	60
Of the Local Government Board	61
Of Poor Law Settlements.. .. .	63
Of Relief and Removal of Paupers	67
Of the Poor Rate	71
Of Rates collected with the Poor Rate	78

CHAP. III.

OF THE LAWS RELATING TO CHARITIES, SAVINGS BANKS, AND FRIENDLY
AND OTHER SOCIETIES.

Of Charities generally	80
Of the Charitable Trusts Acts	84
Of Savings Banks	90
Of Friendly Societies	96
Of Building Societies	100
Of Industrial and Provident Societies	<i>ibid.</i>

CHAP. IV.

OF THE LAWS RELATING TO EDUCATION.

Of Public Elementary Education	102
Of Public and Endowed Schools	108
Of Sites for Schools, and for Institutions	113
Of Parliamentary Grants for the Education of the Poor	116
Of Pauper Schools.. .. .	118
Of Reformatory Schools	119
Of Industrial Schools	121

CHAP. V.

OF THE LAWS RELATING TO LUNATIC ASYLUMS, AND THEIR
MANAGEMENT.

Of County Lunatic Asylums	125
Of the Lunacy Act, 1890	126
Of Pauper Lunatics	<i>ibid.</i>
Of Criminal Lunatics	132
Of Lunatics generally	134
Of Idiots	136

CHAP. VI.

OF THE LAWS RELATING TO PRISONS.

	PAGE
Of Gaolers	138
Of Houses of Correction	<i>ibid.</i>
Of the Prisons Acts	140
Of Prison Discipline	141
Of Millbank Prison	142
Of Parkhurst Prison	143
Of Pentonville Prison	144

CHAP. VII.

OF THE LAWS RELATING TO HIGHWAYS—AND HEREIN OF BRIDGES AND
TURNPIKE ROADS.

Of the Dedication of Public Roads	145
Of the Repair of Highways	146
Of the Repair of Bridges	<i>ibid.</i>
Of Highways generally	150
Of Turnpike Roads	155
Of Main Roads	159

CHAP. VIII.

OF THE LAWS RELATING TO NAVIGATION—AND TO THE MERCANTILE
MARINE.

Of the Navigation Acts	161
Of the Merchant Shipping Act (1894)	164
Of the Ownership, Registration, and Transfer of Merchant Ships ..	165
Of the Laws relating to Merchant Seamen	168
Of Pilotage	173
Of Lighthouses, Beacons, and Sea-Marks	176
Of the Liability of Shipowners	179
Of the Laws relating to Fisheries	182

CHAP. IX.

OF THE LAWS RELATING TO THE SANITARY CONDITION OF THE
PEOPLE.

Of the Plague	185
Of Quarantine	<i>ibid.</i>
Of the Asiatic Cholera	187
Of the Small Pox	<i>ibid.</i>

CHAP. IX.—(*continued*).

	PAGE
Of “The Public Health Act (1848)”	189
Of the Local Government Acts	<i>ibid.</i>
Of “The Diseases Prevention Act (1855)”	<i>ibid.</i>
Of “The Nuisances Removal Act for England (1855)”	190
Of the Local Government Board	191
Of “The Public Health Acts (1875 and 1891)”	192

CHAP. X.

OF THE LAWS RELATING TO PUBLIC CONVEYANCES.

Of Stage Coaches	196
Of Railways	198
Of Conveyances by Water	202
Of “The Passengers’ Acts”	203

CHAP. XI.

OF THE LAWS RELATING TO THE PRESS.

Of the Liberty of the Press	205
Of certain Restrictive Regulations	206
Of the Newspaper Libel Acts	207

CHAP. XII.

OF THE LAWS RELATING TO HOUSES OF PUBLIC RECEPTION AND
ENTERTAINMENT.

Of Public Houses	209
Of the Licensing Acts	<i>ibid.</i>
Of Refreshment Houses	214
Of Theatres	215

CHAP. XIII.

OF THE LAWS RELATING TO PROFESSIONS.

Of the Medical Profession	218
Of Physicians	<i>ibid.</i>
Of Surgeons	219
Of Apothecaries	220
Of Chemists and Druggists	221
Of the Medical Acts	222

CHAP. XIII.—*(continued.)*

	PAGE
Of the Schools of Anatomy	227
Of Dentistry and Dentists	228
Of the Legal Profession	<i>Ibid.</i>
Of the Solicitors Acts	229
Of the Registrar of Solicitors	232
Of the Privileges and Disabilities of Solicitors	235
Of the Retainer and Duties of Solicitors	236
Of the Bills of Costs and Remuneration of Solicitors	237
Of the Remedies for and against Solicitors	245

CHAP. XIV.

OF THE LAWS RELATING TO BANKS.

Of the Origin of Banks	247
Of the Bank of England	248
Of Banks of Issue, or of Deposit	249
Of Branches of the Bank of England	250
Of the Banking Act of 1844	251
Of Joint Stock Banks	253
Of the Bankers' Books Evidence Act	256

CHAP. XV.

OF THE LAWS RELATING TO THE REGISTRATION OF BIRTHS AND DEATHS.

Of the Ecclesiastical Mode of Registration	257
Of the Civil Mode of Registration	259
Of the Registration of Births	261
Of the Registration of Deaths	262



Book V.

OF CIVIL INJURIES.



CHAP. I.

OF THE REDRESS OF INJURIES BY THE MERE ACT OF THE PARTIES.

	PAGE
Of Wrongs in general	264
Of Self-defence	265
Of Recaption or Reprisal	266
Of Entry	267
Of Abatement of Nuisances	268
Of Distress	269
Of the Seizure of Heriots, Waifs, &c.	283
Of Accord and Satisfaction	284
Of Arbitration	285

CHAP. II.

OF REDRESS BY THE MERE OPERATION OF LAW.

Of Retainer	292
Of Remitter	293

CHAP. III.

OF THE COURTS IN GENERAL.

Of the different Species of Courts	295
Of Solicitors	299
Of Counsel	300

CHAP. IV.

OF THE INTERIOR COURTS.

Of the Court Baron	306
Of the Hundred Court	308
Of the Sheriff's County Court	309
Of the County Courts	311

CHAP. IV.—(continued)

	PAGE
Of Borough Courts	325
Of the Courts of Sewers	328
Of the Stannary Courts	331
Of the University Courts	333
Of the Ecclesiastical Courts	334
Of Ecclesiastical Wrongs	343
Of Ecclesiastical Procedure	347
Of Courts Martial	350

CHAP. V.

OF THE SUPREME COURT OF JUDICATURE.

Of the High Court of Chancery	355
Of the Court of Queen's Bench	365
Of the Court of Common Pleas	368
Of the Court of Exchequer	<i>ibid.</i>
Of the High Court of Admiralty	372
Of the Court of Probate	376
Of the Court for Divorce and Matrimonial Causes	<i>ibid.</i>
Of the Court of Bankruptcy	<i>ibid.</i>
Of Courts of Lancaster and Durham	378
Of Courts of Assize	380
Of the High Court of Justice	384
Of the Chancery Division	385
Of the Queen's Bench Division	386
Of the Common Pleas Division	<i>ibid.</i>
Of the Exchequer Division	<i>ibid.</i>
Of the Probate, Divorce and Admiralty Division	387
Of the Bankruptcy Division	<i>ibid.</i>
Of the Court of Appeal	388

CHAP. VI.

OF THE ULTIMATE COURTS OF APPEAL.

Of the House of Lords	394
Of the Judicial Committee	396

CHAP. VII.

OF THE DIFFERENT SPECIES OF CIVIL INJURIES AND THEIR REMEDIES—
AND HEREIN OF THE REMEDY BY ACTION GENERALLY.

	PAGE
Of Actions generally	397
Of Personal Actions	399
Of Real Actions	400
Of Mixed Actions	<i>ibid.</i>
Of Actions on Contracts or on Torts	401
Of the Forms of Personal Actions	402
Of Actions Local or Transitory	403
Of Actions for the Specific Recovery of Property, or for Damages	404
Of <i>Damnum absque Injuriâ</i>	406
Of the Transfer of Rights of Action, by Act of Law	407
Of the Action by the Representatives of a Person killed	408

CHAP. VIII.

OF THE DIFFERENT SPECIES OF CIVIL INJURIES, AND THEIR REMEDIES.

Of Injuries affecting Personal Rights	410
Of Injuries affecting Rights of Property	424
(1.) Real Property	425
(2.) Personal Property	465
Of Injuries affecting Rights in Private Relations	478
Of Injuries affecting Public Rights	485

CHAP. IX.

OF EQUITY IN ITS RELATION TO LAW.

Of the Distinction between Law and Equity	487
Of the Subjects of Equitable Jurisdiction	494
Of Equitable Relief	497
Of Equity in Relation to Trusts	<i>ibid.</i>
Of Decreeing Specific Performance	503
Of an Injunction	504
Of Perpetuating Testimony	505

CHAP. X.

OF THE LIMITATION OF ACTIONS.

Of the Statutes of Limitation	508
Of Limitation as to Entry or Distress, and as to Proceedings for the Recovery of the Realty or of Rights issuing thereout	509
Of Limitation as to Actions not brought for Recovery of Things Real	518

CHAP. XI.

OF THE PROCEEDINGS IN AN ACTION.

	PAGE
Of the Division of the Year into Terms	526
Of the Process	532
Of the Pleadings	543
Of the Trial and Evidence	557
Of the Judgment	597
Of Costs	608
Of Execution	612
Of Appeal	624

CHAP. XII.

OF INTERLOCUTORY AND INCIDENTAL PROCEEDINGS, AND HEREIN OF
PREROGATIVE WRITS.

Of Motions	627
Of Interpleader	630
Of Interlocutory Applications	632
Of the Writ of Scire Facias	633
Of the Writ of Procecdendo	634
Of the Writ of Mandamus	<i>ibid.</i>
Of the Writ of Prohibition	640
Of an Information in the Nature of a Quo Warranto	643
Of the Writ of Habeas Corpus	646
Of the Writ of Certiorari	655

CHAP. XIII.

OF PROCEEDINGS IN THE CHANCERY DIVISION.

Of the Process	658
Of the Pleadings	659
Of the Trial and Evidence	661
Of the Judgment	663
Of Execution	664
Of Appeal	665

CHAP. XIV.

OF PROCEEDINGS IN THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

Of a Probate Action	667
Of a Divorce Petition	670
Of an Admiralty Action	674

CHAP. XV.

OF INJURIES AFFECTING THE CROWN.

	PAGE
Of obtaining Redress from the Crown	678
Of Injuries to the Crown	682
Of an Inquisition or Inquest of Office	<i>ibid.</i>
Of an Extent in Chief	685
Of an Extent in Aid	689
Of a <i>Diem Clausit Extremum</i>	<i>ibid.</i>
Of a <i>Scire Facias</i>	<i>ibid.</i>
Of an Information in the Exchequer	690

VOLUME IV.

Book VI.

OF CRIMES.

CHAP. I.

OF THE NATURE OF CRIMES AND THEIR PUNISHMENTS.

	PAGE
Of the Distinction between Crimes and Civil Injuries	3
Of Misdemeanors and Felonies	6
Of the Right to inflict Punishment	9
Of the Object of Punishment	11
Of the Measure of Punishment	12

CHAP. II.

OF THE PERSONS CAPABLE OF COMMITTING CRIMES.

Of Persons who are not capable of committing Crimes	17
Of Infancy	18
Of Idiocy or Lunacy	21
Of Drunkenness	23
Of Misfortune or Chance	24
Of Ignorance or Mistake	25
Of Compulsion and Necessity	<i>ibid.</i>
Of the Incapacity of the Sovereign to commit Crime	29

CHAP. III.

OF PRINCIPALS AND ACCESSORIES.

Of a Principal in the First Degree	30
Of a Principal in the Second Degree	<i>ibid.</i>
Of Accessories	31
Of Accessories before the Fact	32
Of Accessories after the Fact	33
Of the Punishment of Accessories	34

CHAP. IV.

OF OFFENCES AGAINST THE PERSON AND REPUTATION.

	PAGE
Of Homicide	37
Of Justifiable Homicide	38
Of Excusable Homicide	41
Of Felonious Homicide	46
Of Self-Murder	<i>ibid.</i>
Of Manslaughter	49
Of Murder	51
Of Attempts to Murder	62
Of Conspiracy to Murder	63
Of Acts causing Danger to Life or Bodily Harm	64
Of Procuring Miscarriage	67
Of Concealment of Birth	<i>ibid.</i>
Of Abduction of Females	68
Of Rape	70
Of Defilement or Abuse of Children	75
Of Kidnapping and Child Stealing	76
Of Abandoning Children	77
Of Endangering Railway Passengers	78
Of Setting Spring Guns, or destructive Engines	<i>ibid.</i>
Of Assaults, Batteries, and False Imprisonment	79
Of Bigamy	80
Of Publication of a Libel	82

CHAP. V.

OF OFFENCES AGAINST RIGHTS OF PROPERTY OR ARISING OUT OF CONTRACT.

Of Arson	85
Of Burglary	89
Of Sacrilege and Housebreaking	95
Of Larceny	96
Of Larceny in a Dwelling-house	105
Of Larceny in Ships, Wharfs, &c.	106
Of Larceny from the Person	<i>ibid.</i>
Of Assault with intent to Rob	109
Of Extorting Money by Threats, Accusations, &c.	110
Of Larceny or Embezzlement by Clerks, Servants, &c.	111
Of Larceny in relation to the Post Office	116
Of Receiving Stolen Property	117
Of Malicious Mischief	119
Of Forgery	122
Of the Merchandise Marks Act, 1887	125

CHAP. V.—*continued*.

	PAGE
Of Obtaining Money by False Personation	127
Of Obtaining Money by False Pretences	<i>ibid.</i>
Of Fraudulent Concealment of Deeds, and Falsification of Pedigree	128
Of Falsification of Accounts	129
Of Offences relating to the Coin	<i>ibid.</i>
Of Fraudulent Debtors	135
Of Cheating	<i>ibid.</i>

CHAP. VI.

OF OFFENCES AGAINST PUBLIC ORDER, INTERNAL AND EXTERNAL.

Of High Treason	137
Of Mispriison of Treason	151
Of Discharging Fire Arms, &c., at the Queen	153
Of Treason Felony	<i>ibid.</i>
Of Scandal against the Sovereign	154
Of Præmunire	155
Of Contempts against the Title of the Sovereign	167
Of Contempts against the Crown's Ecclesiastical Supremacy ..	<i>ibid.</i>
Of Contempts against the Royal Palaces	168
Of Maladministration of High Officers	169
Of Selling Public Offices	<i>ibid.</i>
Of Offences relating to the Customs	170
Of Offences relating to the Royal Stores, Ships, &c.	171
Of Serving Foreign States	172
Of Desertion, or Seducing to Desert, ...	173
Of Unlawful Oaths, and Illegal Societies	174
Of Miscellaneous Contempts against the Prerogative	176
Of Riotously Demolishing Churches, Houses, &c.	177
Of Destroying Game by Night	178
Of Affrays	180
Of Riots, Routs, and Unlawful Assemblies	182
Of Tumultuous Petitioning	185
Of Forcible Entry and Detainer	186
Of Riding Armed	<i>ibid.</i>
Of Spreading False News	187
Of False and Pretended Prophecies	<i>ibid.</i>
Of Challenges to Fight	<i>ibid.</i>
Of Offences against the Law of Nations	188
Of the Violation of Safe Conducts	189
Of Violating Rights of Ambassadors	191
Of Piracy	<i>ibid.</i>

CHAP. VII.

OF OFFENCES AGAINST RELIGION, MORALS AND PUBLIC CONVENIENCE.

	PAGE
Of Apostasy	195
Of Heresy	197
Of Blasphemy	200
Of Reviling the Ordinances of the Church	201
Of Profane Swearing	202
Of Using Pretended Witchcraft, &c.	203
Of Religious Imposture	205
Of Simony	<i>ibid.</i>
Of Profanation of the Lord's Day	<i>ibid.</i>
Of the Crime against Nature	207
Of Selling Unwholesome Provisions	209
Of Common Nuisances	212
Of Lewdness	218
Of Drunkenness	220
Of Furious Driving	221
Of Cruelty to Animals	<i>ibid.</i>
Of Cruelty to Children	223
Of Taking up Dead Bodies	225
Of Refusing to serve a Public Office	226
Of Vagrancy, &c.	<i>ibid.</i>
Of Gypsies	227

CHAP. VIII.

OF OFFENCES AFFECTING THE ADMINISTRATION OF JUSTICE AND THE
MAINTENANCE OF PUBLIC ORDER.

Of Stealing, Injuring, and Falsifying Records	229
Of Striking, or other Outrage, in the Superior Courts	231
Of Intimidation of Parties or Witnesses	232
Of Obstructing a Lawful Arrest or Process	233
Of Escape and Prison Breach	234
Of Rescue and Aiding Prisoners to Escape	236
Of Taking a Reward for restoring Stolen Goods	237
Of Compounding of Felony	238
Of Misprision of Felony	239
Of Compounding Informations and Misdemeanors	240
Of Common Barratry	241
Of Maintenance	242
Of Champerty	243
Of Conspiracy	<i>ibid.</i>
Of Perjury	246
Of Bribery	249
Of Bribery in Municipal Offices	250
Of Negligence in Public Officers	251
Of Oppression and Partiality	252
Of Extortion	<i>ibid.</i>

CHAP. IX.

OF THE MEANS OF PREVENTING OFFENCES.

	PAGE
Of Preventing the Commission of Crimes	253
Of Security for Keeping the Peace	256
Of Security for Good Behaviour	257
Of Probation of First Offenders	259

CHAP. X.

OF COURTS OF A CRIMINAL JURISDICTION.

Of the Courts of Criminal Jurisdiction in general	262
Of the High Court of Parliament	<i>ibid.</i>
Of the Court of the Lord High Steward	265
Of the Queen's Bench Division of the High Court of Justice ..	269
Of the Jurisdiction in Admiralty	272
Of the Assizes	276
Of the Central Criminal Court	278
Of the General Quarter Sessions	279
Of the Coroner's Court	285
Of the Sheriff's Tourn (<i>abolished</i>)	<i>ibid.</i>
Of the Court Leet or View of Frankpledge	<i>ibid.</i>
Of the Court of the Clerk of the Market	287
Of the Court of the Lord Steward of the Household	288
Of the University Courts	289

CHAP. XI.

OF PROCEEDINGS OF A SUMMARY NATURE, AND HEREIN OF SUMMARY
CONVICTIONS AND ATTACHMENT.

Of Summary Proceedings generally	292
Of Revenue, &c. Proceedings	<i>ibid.</i>
Of Proceedings before Justices of the Peace	293
Of Assault Cases	294
Of Summary Jurisdiction in Indictable Offences	295
Of the Proceedings before a Court of Summary Jurisdiction ..	299
Of the Process on Attachment for Contempt	302

CHAP. XII.

OF ARRESTS ON CRIMINAL CHARGES.

Of Arrests by Warrant	307
Of Arrests without a Warrant	311
Of Hue and Cry	314

CHAP. XIII.

OF COMMITMENT AND BAIL.

	PAGE
Of the Examination before the Magistrate	317
Of Discharging Person charged	318
Of Bailing	319
Of Committing to Gaol	320
Of Recognizances to Prosecute and give Evidence	321

CHAP. XIV.

OF THE SEVERAL MODES OF PROSECUTION.

Of a Presentment	322
Of an Indictment	323
Of an Information	333
In Cases of Newspaper Libels	338
Of the Antient Prosecution by Appeal	340

CHAP. XV.

OF PROCESS : AND HEREIN OF CERTIORARI.

Of Process after Indictment found	342
Of Capias and Bench Warrant	344
Of Outlawry, and the Reversal thereof	345
Of Certiorari	346

CHAP. XVI.

OF ARRAIGNMENT AND ITS INCIDENTS.

Of the Mode of Arraignment	350
Of Standing Mute	351
Of Confession	353

CHAP. XVII.

OF PLEA AND ISSUE.

Of a Plea to the Jurisdiction	357
Of a Demurrer	<i>ibid.</i>
Of a Plea in Abatement	358
Of a Special Plea in Bar	359
Of the General Issue or Plea of Not Guilty	363

CHAP. XVIII.

OF TRIAL AND CONVICTION.

	PAGE
Of the Antient Methods of Criminal Trial	365
Of Trial of Peers in the Court of Parliament	373
Of Trial by Jury	<i>ibid.</i>
Of Certain Differences between Civil and Criminal Evidence ..	381
Of Conviction	390
Of the Costs of the Prosecutor	390
Of Restitution of Goods	393

CHAP. XIX.

OF JUDGMENT AND ITS CONSEQUENCES.

Of Motion in Arrest of Judgment	394
Of Pronouncing and Recording Judgment	396
Of Fines	398
Of Imprisonment	401
Of Whipping	<i>ibid.</i>
Of Penal Servitude	403
Of Police Supervision	405
Of Sentence of Death	406
Of Attainder	407
Of Forfeiture on Attainder	408
Of Forfeiture of Goods and Chattels	412
Of the Difference between Forfeiture on Attainder and on Con- viction	413

CHAP. XX.

OF REVERSAL OF JUDGMENT.

Of Setting Aside or Reversing Judgment without Error	416
Of Reversing by Writ of Error	417
Of Effect of Reversing Judgment of Outlawry	418

CHAP. XXI.

OF REPRIEVE AND PARDON.

Of Reprieve	419
Of Pardon	420

CHAP. XXII.

OF EXECUTION.

	PAGE
Of the Manner of carrying into Execution a Sentence of Death ..	429
Of the Prerogative of the Crown as to Mode of Execution ..	431

CONCLUSION.

OF THE RISE, PROGRESS, AND GRADUAL IMPROVEMENT OF THE LAWS
OF ENGLAND.

Of the Progress from the earliest Times to the Norman Conquest ..	433
Of the Progress from the Norman Conquest to Edward I. ..	441
Of the Progress from Edward I. to the Reformation	451
Of the Progress from the Reformation to the Restoration ..	456
Of the Progress from the Restoration to the Revolution	464
Of the Progress from the Revolution to the Present Time ..	466

TABLE OF STATUTES	475
-------------------------	-----

GENERAL INDEX	517—669
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NOTICE TO THE READER.

The portions of these Commentaries which lie between brackets [] are taken *substantially* from Blackstone; and rest, chiefly, on his authority. To enable the reader to distinguish these portions from other parts of the work, upon merely opening the volume, and without being obliged to turn the leaves over backwards, the continuation of an extract is always marked by a new bracket at the top of the page.

INTRODUCTION.

SECTION I. OF THE STUDY OF THE LAW.

AT the outset of a work like the present, in the course of which it is proposed (though with the aid, in part, of materials derived from a former writer) to bring under examination no less a subject than the entire body of the English law, the discouragement to which the writer is naturally inclined by the magnitude of the task before him, is counteracted by the recollection of its general importance. The subject is one to which no class of readers in the realm can be indifferent; [for it is incumbent upon every man to be acquainted with those laws at least with which he is immediately concerned, lest he incur the censure, as well as the inconvenience, of living in society without knowing the obligations which it lays him under; and a knowledge of the law is still more incumbent upon men of rank and education, who are under duties both to the public and to themselves, and cannot discharge such duties without some degree of knowledge in the laws. To evince this the more clearly it may not be amiss to descend to a few particulars.

Let us therefore begin with gentlemen of independent estates and fortune, the most useful as well as considerable body of men in the nation; whom even to suppose ignorant in this branch of learning is treated by Mr. Locke as

[a strange absurdity (a). It is their landed property, with its long and voluminous train of descents and conveyances, settlements, entails, and incumbrances, that forms the most intricate and most extensive object of legal knowledge. The thorough comprehension of these, in all their minute distinctions, is perhaps too laborious a task for any but a lawyer by profession: yet still the understanding of a few leading principles relating to estates and conveyancing, may form some check and guard upon a gentleman's inferior agents, and preserve him at least from very gross and notorious imposition.

Again, the policy of all laws has made some forms necessary in the wording of last wills and testaments, and more especially with regard to their attestation. An ignorance in these, must always be of dangerous consequence to such as by choice or necessity compile their own testaments without any technical assistance. Those who have attended the courts of justice are the best witnesses of the confusion and distresses that are hereby occasioned in families; and of the difficulties that arise in discerning the true meaning of the testator, or sometimes in discovering any meaning at all; so that in the end his estate may often be vested quite contrary to these his enigmatical intentions, because perhaps he has omitted one or two formal words, which are necessary to ascertain the sense with indisputable legal precision, or has executed his will in the presence of fewer witnesses than the law requires.

But to proceed from private concerns to those of a more public consideration. All gentlemen of fortune are, in consequence of their property, liable to be called upon to establish the rights, to estimate the injuries, to weigh the accusations, and sometimes to dispose of the lives of their fellow-subjects, by serving upon juries. In this situation they have frequently a right to decide, and that upon their oaths, questions of nice importance, for the

[solution of which some legal skill is requisite ; especially where the law and the fact, as it often happens, are intimately blended together. And when juries are incapable of doing this with tolerable propriety, it tends proportionably to lower their authority and to throw more power into the hands of the judges, to direct, control, and even reverse their verdicts, than perhaps the constitution intended.

But it is not as a juror only that the English gentleman is called upon to determine questions of right, and distribute justice to his fellow-subjects : it is principally with this order of men that the commission of the peace is filled. And here a very ample field is opened for a gentleman to exert his talents, by maintaining good order in his neighbourhood ; by punishing the dissolute and idle ; by protecting the peaceable and industrious : and, above all, by healing petty differences and preventing vexatious prosecutions. But, in order to attain these desirable ends, it is necessary that the magistrate should understand his business ; and have not only the will, but the power also, (under which must be included the knowledge,) of administering legal and effectual justice. Else, when he has mistaken his authority, through passion, through ignorance, or absurdity, he will be the object of contempt from his inferiors, and of censure from those to whom he is accountable for his conduct.

Yet farther ; most gentlemen of considerable property, at some period or other in their lives, are ambitious of representing their country in parliament ; and those, who are ambitious of receiving so high a trust, would also do well to remember its nature and importance. They are not thus honourably distinguished from the rest of their fellow-subjects, merely that they may list under party banners ; may grant or withhold supplies ; may vote with or vote against a popular or unpopular administration ; but upon considerations far more interesting and important. They are the guardians of the English constitution ; the makers,

[repealers, and interpreters of the English laws; delegated to watch, to check, and to avert every dangerous innovation; to propose, to adopt, and to cherish any solid and well-weighed improvement: bound by every tie of nature, of honour, and of religion, to transmit that constitution and those laws to their posterity, amended if possible, but at the least without any derogation. And how unbecoming must it appear in a member of the legislature to vote for a new law, who is utterly ignorant of the old! what kind of interpretation can he be enabled to give, who is a stranger to the text upon which he comments!

Indeed it is perfectly amazing that there should be no other state of life, no other occupation, art, or science, in which some method of instruction is not looked upon as requisite, except only the science of legislation, the noblest and most difficult of any. Apprenticeships are held necessary to almost every art, commercial or mechanical: a long course of reading and study must form the divine, the physician, and the practical professor of the laws: but every man of superior fortune thinks himself *born* a legislator. Yet Cicero was of a different opinion: "it is necessary," says he, "for a senator to be thoroughly acquainted with the constitution; and this," he declares, "is a knowledge of the most extensive nature; a matter of science, of diligence, of reflection; without which no senator can possibly be fit for his office" (b).

The mischiefs that have arisen to the public from inconsiderate alterations in our laws, are too obvious to be called in question; and how far they have been owing to the defective education of our senators, is a point well worthy the public attention. The common law of England has fared like other venerable edifices of antiquity, which rash and unexperienced workmen have ventured to

(b) "*Est senatori necessarium nosse rempublicam: idque late patet:—genus hoc omne scientiæ, diligentiae, memoriæ est; sine quo paratus esse senator nullo pacto potest.*" De Leg. 3, 18.

[new-dress and refine, with all the rage of modern improvement. Hence frequently its symmetry has been destroyed, its proportions distorted, and its majestic simplicity exchanged for specious embellishments and fantastic novelties. For, to say the truth, almost all the perplexed questions, almost all the niceties, intricacies, and delays, (which have sometimes disgraced the English, as well as other courts of justice,) owe their original, not to the common law itself, but to innovations that have been made in it by acts of parliament, “overladen” (as Sir Edward Coke expresses it) “with provisoes and additions, and many times on a sudden penned or corrected by men of none or very little judgment in law” (c). This great and well-experienced judge declares, that in all his time he never knew two questions made upon rights merely depending upon the common law; and warmly laments the confusion introduced by ill-judging and unlearned legislators. “But if,” he subjoins, “acts of parliament were, after the old fashion, penned by such only as perfectly knew what the common law was before the making of any act of parliament concerning that matter, as also how far former statutes had provided remedy for former mischiefs and defects discovered by experience; then should very few questions in law arise, and the learned should not so often and so much perplex their heads to make atonement and peace, by construction of law, between insensible and disagreeing words, sentences, and provisoes, as they do now.” And what is said of gentlemen in general, and the propriety of their application to the study of the laws of their country, is equally applicable to the nobility of this realm; who, besides their large possessions, are hereditary counsellors of the crown, and judges upon their honour of the lives of their brother peers. And here we will refer to the story of Servius Sulpicius, a gentleman of the patrician

[order, and a celebrated orator, who, having occasion to take the opinion of Quintus Mutius Scævola, the then oracle of the Roman law, was unable, for want of some knowledge of that science, to understand even the language which his friend was obliged to use; whereupon Mutius Scævola upbraided him with this reproof, "that it was a shame for a patrician, a nobleman, and an orator of causes, to be ignorant of that law in which he was so peculiarly concerned" (*d*); and the story is, that this reproach made so deep an impression on Sulpicius, that he immediately applied himself to the study of the law, and arrived therein to that proficiency, that he became, in the opinion of Cicero, a much more complete lawyer than even Mutius Scævola himself (*e*).

Nor will some degree of legal knowledge be found in the least superfluous to persons of inferior rank; and the clergy, in particular, have abundant reason to be acquainted with many branches of the law, which are almost peculiar to themselves alone. Such are the laws relating to advowsons, institutions, and inductions; to simony, and simoniacal contracts; to uniformity, residence, and pluralities; to tithes and other ecclesiastical dues; to marriages, and to a variety of other subjects, which are consigned to the care of their order by the provisions of particular statutes; to understand all which aright, demands a legal apprehension, which is no otherwise to be acquired than by use, and a familiar acquaintance with legal writers.]

To gentlemen of the faculty of physie also the study of the law is attended with some importance, not only to complete their character for general and extensive knowledge, a character which their profession has always remarkably deserved, but also to enable them to give more satisfactory evidence in a variety of cases in which they are

(*d*) Ff. 1, 2, s. 43. "*Turpe esse jus in quo versaretur ignorare.*"
patricio, et nobili, et causas oranti,

(*e*) Brut. 41.

liable to be examined as witnesses. The frequent combination of medical with legal considerations, upon inquiries relative to suspected murder or doubtful sanity, and other points of the like nature, has given birth to a sort of mixed science, known by the name of *Forensic Medicine*, or *Medical Jurisprudence*, which may be considered as common ground to the practitioners both of law and of physic.

[But those gentlemen who profess the civil and ecclesiastical laws are of all men (next to common lawyers) the most indispensably obliged to apply themselves seriously to the study of our municipal laws. For the civil and canon laws, considered with respect to any intrinsic obligation, have no force or authority in this kingdom; they are no more binding in England than our laws are binding at Rome. But as far as these foreign laws, on account of some peculiar propriety, have in some particular cases been introduced and allowed by our laws, so far they oblige, and no farther; their authority being wholly founded upon that permission and adoption. And in those cases wherein a reception has been thus allowed to the civil and canon laws, if either they exceed the bounds of that reception, by extending themselves to other matters than are permitted to them, or if the judges proceed according to the decisions of those laws, in cases wherein it is controlled by the law of the land, the common law in either instance both may, and frequently does, prohibit and annul their proceedings (*f*): and it will not be a sufficient excuse for them to allege that such or such a practice is warranted by the laws of Justinian or Gregory, or is conformable to the decrees of the Rota or imperial chamber. For which reason it becomes highly necessary for everyone who would act with safety as a judge, or with prudence and reputation as an advocate, to know in what cases and how far the

(*f*) Hale, Hist. C. L. 2; Selden in Fletam; 5 Rep., Caudrey's case; 2 Inst. 599.

[English laws have given sanction to the Roman ; in what points the latter are rejected ; and where they are both so intermixed and blended together as to form certain supplemental parts of the common law of England, distinguished by the titles of the maritime and the ecclesiastical law.]

The general use and necessity of some acquaintance with the common law being thus apparent, it may naturally be supposed that some provision would antiently have been made for this, as for other branches of education, in the universities of Oxford and Cambridge. The reverse, however, is the fact—the study of the common law having until recent times been wholly neglected in those venerable seats of learning, and having been cultivated from the earliest period in a different region. How this came to pass will appear from the following retrospect.

[That antient collection of unwritten maxims and customs, which is called the common law, however compounded, or from whatever fountains derived, had subsisted immemorially in this kingdom ; and though somewhat altered and impaired by the violence of the times, in great measure weathered the rude shock of the Norman Conquest. This endeared it to the people in general, as well because its decisions were universally known, as because it was found to be excellently adapted to the genius of the English nation ; and it was then taught, says Mr. Selden, in the monasteries, *in the universities*, and in the families of the principal nobility (*g*). The clergy, in particular, as they then engrossed almost every other branch of learning, so (like their predecessors, the British Druids) were peculiarly remarkable for their proficiency in the study of the law (*h*). *Nullus clericus nisi causidicus*, is the character given of them soon after the Conquest, by William of Malmsbury (*i*) The judges therefore were usually created out of the sacred order (*j*),

(*g*) In Fletam, 7, 7.

(*h*) Cæsar de Bello Gal. 6, 12.

(*i*) De Gest. Reg. 1, 4.

(*j*) Dugdale, Orig. Jurid. c. 8.

[as was likewise the case among the Normans (*k*) ; and all the inferior offices were supplied by the lower clergy, which occasioned their successors to be denominated *clerks*, as they are to this day.

But the common law of England, being not committed to writing, but only handed down by tradition, use, and experience, was not so heartily relished by the foreign clergy, who came over hither in shoals during the reign of the Conqueror and his two sons, and were utter strangers to our constitution as well as to our language.] And it was nearly brought to ruin by the new impulse given in the 12th century to the study of the system of Roman law compiled by Justinian, and its consequent reception over all the west of Europe ; where, previously, it had possessed, in general, no authority, and had fallen almost into oblivion (*l*). [Hence that law became in a particular manner the favourite of the popish clergy, who borrowed the method and many of the maxims of their canon law from this original. The study of it was introduced into several universities abroad, particularly that of Bologna, where exercises were performed, lectures read, and degrees conferred in this faculty, as in other branches of science ; and many nations on the continent, just then beginning to recover from the convulsions consequent upon the overthrow of the Roman empire, and settling by degrees into peaceable forms of government, also adopted

(*k*) "*Les juges sont sages personnes et autentiques,—sicomme les archevesques, evesques, les chanoines des eglises cathedraulx, et les aultres personnes qui ont dignitez en sainte eglise ; les abbez, les prieurs conventuaulx, et les gouverneurs des eglises, &c.*"—Grand Coustumier, ch. 9.

(*l*) Hallam's Middle Ages, 3rd vol. p. 513 ; 1 Bla. Com. 18 ; 1 Reeves, Hist. Eng. Law, p. 66. It has been said (and the opinion

is adopted by Blackstone) that this revival was owing to the accidental discovery of a copy of the Pandects at the capture of Amalfi by the Pisans, about the year 1130. But there appears to be no sufficient evidence that any such discovery took place. (See Hallam, *ubi sup.* ; and *Histoire du Droit Romain au Moyen-Age*, par M. De Savigny, ch. xviii. s. 35, ch. xxii. ss. 164, 167.)

[the civil law as the basis of their several constitutions; blending and interweaving it among their own feudal customs, in some places with a more extensive, in others with a more confined authority (*m*).

Nor was it long before the prevailing mode of the times reached England: for Theobald, a Norman abbot, being elected, in the year 1138, to the see of Canterbury, and being extremely addicted to this new study, brought over with him in his retinue many learned proficients therein; and among the rest, Roger, surnamed Vacarius, whom he placed in the university of Oxford to teach it to the people of this country (*n*). But it did not meet with the same easy reception in England, where a mild and rational system of laws had been long established, as it did upon the continent; and though the monkish clergy, devoted to the will of a foreign primate, received it with eagerness and zeal, yet the laity, who were more interested to preserve the old constitutions, and had already severely felt the effect of many Norman innovations, continued wedded to the use of the common law. King Stephen immediately published a proclamation forbidding the study of the laws then newly imported from Italy (*o*): but this, which was treated by the monks as a piece of impiety (*p*), though it prevented the introduction of the civil law process into our courts of justice, yet did not hinder the clergy from reading and teaching it in their own schools and monasteries.

From this time the nation seems to have been divided into two parties; on the one hand, the bishops and clergy, many of them foreigners, who applied themselves wholly to the study of the civil law and that of the Roman church (or canon law), which two systems now came to be inse-

(*m*) Domat's Treatise of Law, c. 13, § 9; Epistol. Innocent IV. in M. Paris, A.D. 1254.

(*n*) Gervas. Dorobern. Act. Pontif. Cantuar. Col. 1665.

(*o*) Rog. Bacon, citat. per Selden in Fletam, 7, 6; in Fortesc. c. 33; and 8 Rep. Pref.

(*p*) Joan. Sarisburiens. Polycrat. 8, 22.

[parably interwoven with each other; and, on the other hand, the nobility and laity, who adhered with equal pertinacity to the old common law: both of them reciprocally jealous of what they were unacquainted with, and neither of them, perhaps, allowing the opposite system that real merit which is abundantly to be found in each. This appears, on the one hand, from the spleen with which the monastic writers speak of our municipal laws upon all occasions (*q*); and, on the other, from the firm temper which the nobility shewed at the famous parliament of Merton, when the prelates endeavoured to procure an Act to declare all bastards legitimate in case the parents intermarried at any time afterwards: alleging this only reason, because holy church (that is, the canon law,) declared such children legitimate; but “all the earls and barons” (says the parliament-roll) “with one voice answered, that they would not change the laws of England, which had hitherto been used and approved” (*r*). And we find the same jealousy prevailing above a century afterwards, in the reign of Richard the second, when the nobility declared, with a kind of prophetic spirit, “that the realm of England hath never been unto this hour,—neither by the consent of our lord the king, and the lords of parliament, shall it ever be,—ruled or governed by the civil law” (*s*). And of this temper between the clergy and laity many more instances might be given.

While things were in this situation, the clergy, finding it impossible to root out the municipal law, began to withdraw themselves by degrees from the temporal courts; and to that end, very early in the reign of King Henry the third, episcopal constitutions were published, for-

(*q*) Ibid. 5, 16; Polydor. Virgil, Hist. 1, 9.

(*r*) “*Et omnes comites et barones una voce responderunt, quod nolunt leges Angliæ mutare, quæ hucusque*

usitatæ sunt et approbatæ.” Stat. Merton, 20 Hen. 3, c. 9.

(*s*) Selden, Jan. Anglor. 1, 2, § 43; in Fortesc. c. 33.

[bidding all ecclesiastics to appear as advocates *in foro seculari* (f). Nor did they long continue to act as judges there, not caring to take the oath of office which was then found necessary to be administered, that they should in all things determine according to the law and custom of this realm (u): though they still kept possession of the high office of chancellor, and of the court of chancery attached to it, a court then of little juridical power; and afterwards, as its business increased by degrees, they modelled the process of this court at their own discretion.

But wherever they retired, and wherever their authority extended, they carried with them the same zeal to introduce the rules of the civil, in exclusion of the municipal law. This appears in a particular manner from the spiritual courts of all denominations, as well as from the high court of chancery before mentioned; in all of which the proceedings were conducted in a course much conformed to the civil law; for which no tolerable reason can be assigned, unless that these courts were all under the immediate direction of the popish ecclesiastics, among whom it was a point of religion to exclude the municipal law; Pope Innocent the fourth having forbidden the very reading of it by the clergy, because its decisions were not founded on the imperial constitutions, but merely on the customs of the laity. And if it be considered that our universities began about that period to receive their present form of scholastic discipline; and that they were then, and continued to be till the time of the Reformation, entirely under the influence of the popish clergy; this will lead us to perceive the reason why the study of the Roman laws was in those days of bigotry pursued with such alacrity in these seats of learning; and why the common law was entirely despised, and esteemed little better than heretical.

And after the Reformation, many causes conspired to

(f) Wilkins, Concil. vol. i. pp. 574, 599. (u) Selden in Fletam, 9, 3.

[prevent its becoming a part of academical education : as, first, long usage and established custom, which, as in everything else, so especially in the forms of scholastic exercise, have great weight and authority. Secondly, the real intrinsic merit of the civil law, considered upon the footing of reason and not of obligation, which was well known to the instructors of our youth ; and their total ignorance of the merit of the common law, though its equal at least, and perhaps an improvement on the other. But the principal reason of all that hindered the introduction of this branch of learning, was, that the study of the common law, being banished from our universities in the times of popery, fell into a quite different channel, and was wholly cultivated in another place.

For, being then entirely abandoned by the clergy, a few stragglers excepted, the study and practice of it devolved of course into the hands of laymen ; who (Sir John Fortescue informs us, writing in the reign of Henry the sixth) entertained upon their parts a most hearty aversion to the civil law, and made no scruple to profess their contempt, nay, even their ignorance of it, in the most public manner (*x*). But still, as the balance of learning was greatly on the side of the clergy, and as the common law was no longer *taught*, as formerly, in any part of the kingdom, it must have been subjected to many inconveniences, and perhaps would have been gradually lost and overrun by the civil,—a suspicion well justified from the frequent transcripts of Justinian to be met with in Bracton and Fleta,—had it not been for a peculiar incident, which happened at a very critical time, and contributed greatly to its support.

The incident referred to was the fixing the Court of Common Pleas, the grand tribunal for disputes of property, to be held in one certain spot ; so that the seat of ordinary justice might be permanent and notorious to all

(*x*) Fortesc. de Laud. LL. c. 25.

[the nation. Formerly this court, in conjunction with all the other superior courts, was held before the king's chief justiciary of England, in the *aula regis*, or such of his palaces wherein his royal person resided; and removed, with his household, from one end of the kingdom to the other. This was found to occasion great inconvenience to suitors; to remedy which it was (in the thirteenth century) made an article of the great charter of liberties, both that of King John and that of King Henry the third, that "Common Pleas should no longer follow the king's court, but be held in some certain place;" in consequence of which they were continuously thereafter held (a few necessary removals in times of the plague excepted) in the palace of Westminster only. This brought together the professors of the municipal law, who before were dispersed about the kingdom, and formed them into an aggregate body; whereby a society was established of persons, who (as Spelman observes) addicted themselves wholly to the study of the laws of the land (*y*); and, no longer considering it as a mere subordinate science for the amusement of leisure hours, soon raised those laws to that pitch of perfection, which they suddenly attained under the auspices of our English Justinian, King Edward the First.

In consequence of this lucky assemblage, they naturally fell into a kind of collegiate order, and, being excluded from Oxford and Cambridge, found it necessary to establish a new university of their own. This they did by purchasing at various times certain houses (now called the inns of court and of chancery) between the city of Westminster, (the place of holding the king's courts,) and the city of London; for advantage of ready access to the one, and plenty of provisions in the other (*z*); and here exercises were performed, lectures read, and degrees conferred in the

(*y*) Glossar. 334.

(*z*) Fortesc. c. 48. The Inns of Court are the Inner Temple, the

Middle Temple, Lincoln's Inn, and Gray's Inn.

[common law ; the degrees being those of barristers, at first styled apprentices (*apprenticii ad legem*), who answered to the bachelors : and those of serjeants (*servientes ad legem*), who answered to the doctors of the universities (*a*). And the crown seems to have soon taken under its protection this infant seminary of the common law ; and, the more effectually to foster and cherish it, King Henry the third in the nineteenth year of his reign, issued out an order, directed to the Mayor and Sheriffs of London, commanding that no regent of any law schools *within* that city should, for the future, teach law therein (*b*). The word law, or *leges*, being a general term, may create some doubt at this distance of time, whether the teaching of the civil law, or the common, or both, was thereby restrained. But in either case, it tended to the same end. If the civil law only was prohibited,—which is Mr. Selden’s opinion (*c*),—it was then a retaliation upon the clergy, who had excluded the common law from *their* seats of learning. If the municipal law was also included in the restriction, (as Sir Edward Coke understands it, and which the words seem to import,) then the intention was evidently this,—by preventing private teachers within the walls of the city, to collect all the common lawyers into the one public university which was newly instituted in the suburbs (*d*).

In this juridical university, for such it is insisted to have been by Sir Edward Coke (*e*), there were two sorts of collegiate houses ; one called inns of chancery, in which the younger students of the law were usually placed, “learning and studying (says Fortescue) the originals, and, as it were, the elements of the law ; who, profiting therein, as they grew to ripeness, were admitted into the greater inns of the same study, called the inns of court” (*f*).

(*a*) As to barristers and serjeants, see post, bk. v. ch. iii.

(*b*) “*Ne aliquis scholas regens de legibus in eadem civitate, de cætero ibidem leges doceat.*”

(*c*) In Flet. 8, 2.

(*d*) See 2 Inst. proëm.

(*e*) 3 Rep. pref.

(*f*) C. 49.

[And in these inns of both kinds, he goes on to tell us, the knights and barons, with other grandees and noblemen of the realm, did use to place their children, though they did not desire to have them thoroughly learned in the law, or to get their living by its practice ; and that in his time there were about two thousand students at these several inns, all of whom, he informs us, were *filii nobilium*, gentlemen born.

Hence, it is evident, that though under the influence of the monks our universities neglected this study, yet in the time of Henry the sixth it was thought highly necessary, and was the universal practice, for the young nobility and gentry to be admitted into the inns of court and chancery, there to be instructed in the originals and elements of the laws. But by degrees this custom fell into disuse ; which seems principally owing to these reasons ; first, because in these societies all sorts of regimen and academical superintendence, either with regard to morals or studies, were thought impracticable, and therefore entirely neglected : secondly, because persons of birth and fortune, after having finished their usual courses at the universities, had seldom leisure or resolution sufficient to enter upon a new scheme of study at a new place of instruction]. At the present day the inns of chancery have accordingly sunk into insignificance, and an admission to them is no longer of any avail to the student in his progress to the bar (*g*) ; and even the resort to the inns of court is now very much confined to those to whom the knowledge of practice is absolutely necessary, that is, such as are intended for the profession.

(*g*) The Inns of Chancery were latterly Clifford's Inn, Clement's Inn, New Inn, Staple's Inn, and Barnard's Inn. Besides these, there were formerly Furnival's Inn, the Strand Inn, Lyons' Inn, and Thavies' Inn. As to Inns of Chal-

cery, see *Rex v. Barnard's Inn*, 6 Ad. & El. 17, and the Report of the Commissioners appointed to inquire into their constitution, which was presented to Parliament in the year 1855.

The inns of court still enjoy, however, their antient and exclusive privilege of conferring the rank or degree of *barrister at law*; the possession of which constitutes an indispensable qualification for practising as counsel in the superior courts. No other means of obtaining this degree exist but that of becoming enrolled as a student in one or other of these inns (*h*), and applying, after a certain period, to its principal officers (or *benchers*) for a *call to the bar* (*i*). As a qualification for the call, the student must (as the general rule) have kept commons for three years (*i.e.* twelve terms), by dining in the hall of the society into which he has obtained admission, at least six times in each term. If he be, at the same time, a member of one of the universities of Oxford, Cambridge, Dublin, London, Durham, St. Andrews, Aberdeen, Glasgow, Edinburgh, or of the Victoria University, Manchester, or of the Royal University of Ireland, *three* days in each term are sufficient (*k*); and by the present educational system it is further provided, that no student shall be called to the bar unless he shall, to the satisfaction of the Council of Legal Education, have passed a public examination, for the purpose of ascertaining his fitness to be so called, and have obtained from the said council a certificate of having satisfactorily passed such examination.

(*h*) The candidate for admission as a student, unless he shall have passed a public examination at some university within the British dominions, or for a commission in the Army or Navy, or for the Indian Civil Service, or for the Consular Service, or for cadetships in the three eastern colonies of Ceylon, Hong Kong, and the Straits Settlements, must in general pass a preliminary examination testing his knowledge of the English and Latin languages, and of English history. (See Consol. Reg., Janu-

ary, 1894, superseding those of January, 1890.) As to the relation which exists between the Inns of Court and those who have become members, see *Neate v. Denman*, Law Rep., 18 Eq. Cas. 127; *Manisty v. Kenealy*, 24 W. R. 918.

(*i*) An appeal from the decision of the benchers as to calling to the bar or disbarring, lies to the judges in their capacity of *visitors*. (See *The King v. Lincoln's Inn*, 4 B. & C. 855.)

(*k*) Consol. Reg., January, 1894.

And, accordingly, a public examination, for all the inns collectively, periodically takes place, extending to all students admitted as such to any inn of court, and who are desirous of submitting themselves to that test of proficiency (*l*); and this examination is compulsory in the case of all students, excepting as regards certain colonial barristers who desire to be called to the English Bar. It is further to be observed that academical instruction in the principles of the law of England may be obtained in other schools than those of the inns of court; and though no provision for instruction in such law was antiently made, as we have seen, at either Oxford or Cambridge, that deficiency has been long since redressed by the munificence of private donors, who at each of these universities have founded professorships, with appropriate endowments for that purpose; and in the various colleges affiliated to the University of London, and in the Victoria University (*m*) at Manchester (formerly Owens College), and in the law colleges at Liverpool, and at Bristol, and elsewhere in England, there are also now very effective schools of the common law; likewise also in the various universities or colleges in Scotland and Ireland.

(*l*) Consol. Regulations, January, 1824. For the purpose of affording to students the means of obtaining instruction and guidance in their legal studies, Professors (now called Readers and Assistant Readers) are appointed (by a joint council of the Four Inns) of Roman Law, of Jurisprudence, of Common Law, of Equity, and of the Law of

Real and Personal Property.

(*m*) By the Victoria University Act (51 & 52 Vict. c. 45), the graduates of this university have been placed upon the same level with graduates of the Universities of Oxford, Cambridge, and London, with regard to privileges and exemptions, and eligibility to appointments.

SECTION II.

OF THE NATURE OF LAWS IN GENERAL.



[By the term Laws it is here intended to denote the rules of human action or conduct ; that is to say, the precepts by which man, a creature endowed with both reason and free-will, is commanded to make use of those faculties in the general regulation of his behaviour.

Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being ; and a state of dependence inevitably obliges the inferior to take the will of him on whom he depends, as the rule of his conduct, *scilicet*, to the extent of the dependence ; and as man depends absolutely upon his Maker for everything, it is necessary that he should, in all points, conform to his Maker's will. And this will of his Maker is called the law of nature. For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion ; so, when he created man, and endued him with free-will to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that free-will is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws. Such, among others, are these principles—that we should live reputably, should hurt nobody, and should render to every one his due ; to

[which three general precepts Justinian has reduced the whole doctrine of law (a).]

The constitution and frame of humanity are in this respect, as in all others, so contrived as to afford a striking proof of the benevolence of the great Creator. For he has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that if the former be punctually obeyed, it cannot but induce the latter. In consequence of which mutual connexion of justice and human felicity, we ought to consider the law of nature not as made up of a multitude of abstracted rules and precepts, referring merely to the fitness or unfitness of things, as some have vainly surmised,—but as graciously reduced to this one paternal precept, “that man should pursue his own true and substantial happiness.” [This is the foundation of what we call ethics, or natural law; for the several articles into which it is branched in our systems, amount to no more than demonstrating that this or that action tends to man’s real happiness, and therefore concluding that the performance of it is a part of the law of nature; or, on the other hand, that this or that action is destructive of man’s real happiness, and therefore that the law of nature forbids it.]

But though the real basis of the law of nature is a tendency to promote human happiness, and though to a certain extent this consideration affords a practical test, whether a given course of conduct be naturally right or not, yet the fallibility of human reason, and its inability to judge of the ultimate consequences of things, will in general preclude the application of such a test to particular cases; and accordingly it would seem not to have been the design of the all-wise disposer of the universe that man, even in his perfect state, should be left wholly to

(a) “*Juris præcepta sunt hæc, honeste vivere, alterum non ledere, suum cuique tribuere.*”—Inst. l. 1, 3.

The word *honeste* in this passage

has been rendered by Blackstone, vol. i. p. 40, *honestly*, which scarcely conveys the full meaning.

the guidance of his own understanding or conscience on the subject of moral duty ; but it is at all events certain that, since the Fall, his corrupt and clouded faculties have proved unequal to the task.

[Ample light, however, is now afforded to him by the benign interposition of divine Providence ; which, in compassion to the frailty, the imperfection and the blindness of human reason, hath been pleased, at sundry times and in divers manners, to discover and enforce its laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the Holy Scriptures. These precepts, when revealed, are found upon comparison to be really a part of the original law of nature, as they tend in all their consequences to man's felicity. But we are not from thence to conclude that the knowledge of these truths was attainable by the unaided reason ; since we find that, until they were revealed, they were hid from the wisdom of ages. As, then, the moral precepts of this revealed law are indeed of the same original with those of the law of nature, so their intrinsic obligation is of equal strength and perpetuity. Yet undoubtedly the revealed law is of infinitely more authenticity than that moral system which is framed by ethical writers, and denominated the natural law ; because one is the law of nature, expressly declared so to be by God himself, the other is only what, by the assistance of human reason, we conclude or infer to be that law. If we could be as certain of the latter as we are of the former, both would have an equal authority ; but, till then, they can never be put in any competition together.

Upon these two foundations, the law of nature and the law of revelation, depend all human laws ; that is to say, no human laws should be suffered to contradict these. There are, it is true, a great number of indifferent points in which both the divine law and the natural law leave a man at his own liberty, but which are found necessary, for the benefit of society, to be restrained within certain

[limits. And herein it is that human laws have their peculiar force and efficacy; for with regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination to, the divine law. To instance the case of murder: this is expressly forbidden by the divine, and demonstrably by the natural law; and, from these prohibitions, arises the chief unlawfulness of this crime. Those human laws by which it is also interdicted, add comparatively but little to its moral guilt, or to the duty *in foro conscientie* of abstaining from its perpetration. Nay, if any human law should allow or injoin us to commit it, we are bound to transgress that human law, or else we must offend both the natural and the divine. But, with regard to matters that are in themselves indifferent, and are not commanded or forbidden by those superior laws,—such, for instance, as the importation of particular commodities from foreign countries,—here the inferior legislature has scope and opportunity to interpose, and to make that action unlawful which before and in itself was not so.

But we are further to observe that man was formed for society; and, as is demonstrated by the writers on this subject, is neither capable of living alone, nor indeed has the courage to do it (*b*). However, as it is impossible for the whole race of mankind to be united in one great society, they must necessarily divide into many; and form separate states, commonwealths, and nations, entirely independent of each other, and yet liable to a mutual intercourse. Hence arises a third kind of law to regulate this mutual intercourse, called “the law of nations,” which, as none of these states will acknowledge a superiority in the other, cannot be dictated by any; but depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements between these several communities; in the construction also of which compacts, we have no other rule to resort to, but the law of nature;

(*b*) Puffendorf, l. 7, c. 1, compared with Barbeyrac’s Commentary.

[being the only one to which all the communities are equally subject: and therefore the civil law very justly observes, that *quod naturalis ratio inter homines constituit, vocatur jus gentium* (c).

Thus much it appeared necessary to premise concerning the law of nature, the revealed law, and the law of nations, before a more full exposition was given of the principal subject of this section, municipal law; that is, the rule by which particular districts, communities, or nations, are governed. It is here called municipal law, in compliance with common speech; for, though strictly that expression denotes the particular customs of one single *municipium* or free town, yet it may with sufficient propriety be applied to any one state or nation, which is governed by the same laws and customs.

The true meaning and force of the term (taken in this its ordinary sense) may be more fully developed thus; it is "a rule of civil conduct prescribed by the supreme power in a state" (d).

Let us endeavour to explain the several properties of the municipal law, as they arise out of this definition. And, first, it is a *rule*: not a transient particular order from a superior, to or concerning a particular person; but something permanent, uniform, and universal (e). Therefore a particular Act of the legislature to confiscate the goods of Titius, or to attain him of high treason, does not enter into the idea of a municipal law: for the operation of this Act is spent upon Titius only, and has no relation to the community in general; it is rather a sentence than a law. But an Act to declare that the crime of which Titius is accused shall be deemed high treason: this has permanency, uniformity, and universality, and therefore is properly a

(c) Ff. 1. 1, 9.

(d) "*Jus civile est quod quisque sibi populus constituit.*"—Inst. 1. 2, 1.

(e) An order affecting certain individuals only was, by the Roman jurists, termed *privilegium*. See Austin on Jurisprudence, vol. i. p. 13.

[rule. It is also called a rule, to distinguish it from advice or counsel, which we are at liberty to follow or not, as we see proper, and to judge upon the reasonableness or unreasonableness of the thing advised: whereas our obedience to the law depends not upon our approbation, but upon the maker's will. Counsel is only matter of persuasion, law is matter of injunction; counsel acts only upon the willing, law upon the unwilling also.

It is also called a rule, to distinguish it from a *compact* or *agreement*; for a compact is a promise proceeding from us, law is a command directed to us. The language of a compact is, "I will, or will not do this;" that of a law is, "thou shalt, or shalt not, do it." It is true there is an obligation which a compact carries with it, equal in point of conscience to that of a law; but then the original of the obligation is different. In compacts, we ourselves determine and promise what shall be done, before we are obliged to do it; in laws, we are obliged to act without ourselves in the first instance determining or promising anything at all. Upon these accounts law is defined to be "*a rule.*"

Municipal law is also "*a rule of civil conduct.*" This distinguishes municipal law from the natural, or revealed, the former of which is the rule of moral conduct, and the latter not only the rule of moral conduct, but also the rule of faith. These regard man as a creature, and point out his duty to God, to himself, and to his neighbour, considered in the light of an individual. But municipal or civil law regards him also as a citizen, and bound to other duties towards his neighbour than those of mere nature and religion: duties which he has engaged in by enjoying the benefits of the common union; and which amount to no more than that he do contribute, on his part, to the subsistence and peace of the society.

It is likewise "*a rule prescribed.*" Because a bare resolution confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law; it is requisite that this resolution be noti-

[fied to the people who are to obey it. But the manner in which this notification is to be made, is matter of very great indifference. It may be notified by universal tradition and long practice, which supposes a previous publication, and is the case of the common law of England. It may be notified *vivâ voce*, by officers appointed to proclaim the law which has been made. It may, lastly, be notified by writing, printing, or the like; which is the general course taken with all our acts of parliament. Yet, whatever way is made use of, it is incumbent on the promulgators to do it in the most public and perspicuous manner; not like Caligula, who (according to Dio Cassius) wrote his laws in a very small character, and hung them upon high pillars, the more effectually to ensnare the people. There is a still more unreasonable method than this, which is called the making of laws *ex post facto*; when, after an action (indifferent in itself) is committed, the legislator then, for the first time, declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be in such a case cruel and unjust. All laws should be therefore made to commence *in futuro*, and be notified before their commencement; which is implied in the term "*prescribed*." But when this rule is in the usual manner notified, or prescribed, it is then the subject's business to be thoroughly acquainted therewith; for if ignorance of what he might know were admitted as a legitimate excuse, the laws would be of no effect, but might always be eluded with impunity.

But farther: municipal law is "a rule of civil conduct prescribed *by the supreme power in a state*." For legislature is the greatest act of superiority that can be exercised by one being over another. Wherefore it is requisite to

[the very essence of a law, that it be made by the supreme power. Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other.

This will naturally lead us into a short inquiry concerning the nature of society and civil government; and the natural and inherent right that belongs to the sovereignty of a state, wherever that sovereignty be lodged, of making and enforcing laws.

The only true and natural foundations of society are the wants and the fears of individuals. Not that we can believe, with some theoretical writers, that there ever was a time when there was no such thing as society either natural or civil; and that from the impulse of reason, and through a sense of their wants and weaknesses, individuals met together in a large plain, entered into an original contract, and chose the tallest man present to be their governor. This notion, of an actually existing unconnected state of nature, is too wild to be seriously admitted; and besides, it is plainly contradictory to the revealed accounts of the primitive origin of mankind, and their preservation two thousand years afterwards; both which were effected by the means of single families. These formed the first natural society among themselves; which, every day extending its limits, laid the first though imperfect rudiments of civil or political society; and when it grew too large to subsist with convenience in that pastoral state, wherein the patriarchs appear to have lived, it necessarily subdivided itself by various migrations into more. Afterwards, as agriculture increased, which employs and can maintain a much greater number of hands, migrations became less frequent: and various tribes, which had formerly separated, reunited again; sometimes by compulsion and conquest, sometimes by accident, and sometimes perhaps by compact. But though society had not its formal beginning from any convention of individuals, actuated by their wants and their fears; yet it is the *sense* of their weakness and imperfection that *keeps* mankind

[together; that demonstrates the necessity of this union; and that therefore is the solid and natural foundation, as well as the cement, of civil society. And this is what we mean by the original contract of society; which, though perhaps in no instance it has ever been formally expressed at the first institution of a state, yet in nature and reason must always be understood and implied, in the very act of associating together; namely, that the whole should protect all its parts, and that every part should pay obedience to the will of the whole; or, in other words, that the community should guarantee to each individual member the enjoyment of certain liberties and advantages or (as they are generally termed) *rights*, and that (in return for this protection) each individual should submit to the laws of the community; without which submission of all, it was impossible that protection could be certainly extended to any.

For when civil society is once formed, government at the same time results of course, as necessary to preserve and to keep that society in order. Unless some superior be constituted, whose commands and decisions all the members are bound to obey, they would still remain as in a state of nature, without any judge upon earth to define their several rights, and redress their several wrongs. But, as all the members which compose this society were naturally equal, it may be asked in whose hands are the reins of government to be entrusted? To this the general answer is easy; but the application of it to particular cases has occasioned one half of those mischiefs, which are apt to proceed from misguided political zeal. In general, all mankind will agree that government should be reposed in those persons in whom those qualities are most likely to be found, the perfection of which is among the attributes of Him who is emphatically styled the Supreme Being; the three grand requisites, that is to say, of wisdom, of goodness, and of power; wisdom, to discern the real interest of the community; goodness, to

[endeavour always to pursue that real interest ; and strength or power, to carry this knowledge and intention into action. These are the natural foundations of sovereignty, and these are the requisites that ought to be found in every well-constituted frame of government.

How the several forms of government we now see in the world at first actually began, is matter of great uncertainty, and has occasioned infinite disputes. It is not intended here to enter into any of them. However they began, or by what right soever they subsist, there is and must be in all of them a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside. And this authority is placed in those hands, wherein (according to the opinion of the founders of such respective states, either expressly given, or collected from their tacit approbation) the qualities requisite for supremacy—wisdom, goodness, and power—are the most likely to be found.

The political writers of antiquity will not allow more than three regular forms of government ; the first, when the sovereign power is lodged in an aggregate assembly consisting of all the free members of a community, which is called a democracy ; the second, when it is lodged in a council, composed of select members, and then it is styled an aristocracy ; the last, when it is entrusted in the hands of a single person, and then it takes the name of a monarchy. All other species of government, they say, are either corruptions of, or reducible to, these three.

By the sovereign power, as was before observed, is meant the making of laws ; for wherever that power resides, all others must conform to and be directed by it, whatever appearance the outward form and administration of the government may put on. For it is at any time in the option of the legislature to alter that form and administration by a new edict or rule, and to put the execution of the laws into whatever hands it pleases ;

[by constituting one, or a few, or many executive magistrates: and all the other powers of the state must obey the legislative power in the discharge of their several functions, or else the constitution is at an end.

In a democracy, where the right of making laws resides in the people at large, public virtue or goodness of intention is more likely to be found, than either of the other qualities of government. Popular assemblies are frequently foolish in their contrivance, and weak in their execution; but generally mean to do the thing that is right and just, and have always a degree of patriotism or public spirit. In aristocracies there is more wisdom to be found, than in the other frames of government; being composed, or intended to be composed, of the most experienced citizens: but there is less honesty than in a republic, and less strength than in a monarchy. A monarchy is indeed the most powerful of any; for, by the entire conjunction of the legislative and executive powers, all the sinews of government are knitted together, and united in the hand of the prince: but then there is imminent danger of his employing that strength to improvident or oppressive purposes.

Thus these three species of government have, all of them, their several perfections and imperfections. Democracies are usually the best calculated to direct the end of a law; aristocracies to invent the means by which that end shall be obtained; and monarchies to carry those means into execution. And the antients, it was observed, had in general no idea of any other permanent form of government but these three; for though Cicero declares himself of opinion "*esse optime constitutam rempublicam, quæ ex tribus generibus illis, regali, optimo, ei populari, sit modice confusa*" (*f*); yet Tacitus treats this notion of a mixed government, formed out of them all, and partaking of the advantages of each, as a visionary whim,

(*f*) In his fragments De Rep. l. 2.

[and one that, if effected could never be lasting or secure (g).

But, happily for us of this island, the British constitution has long remained (and may it long continue!) a standing exception to the truth of this observation. For as with us the executive power of the laws is lodged in a single person, they have all the advantages of strength and dispatch, that are to be found in the most absolute monarchy: and as the legislature of the kingdom is entrusted to three distinct powers, entirely independent of each other; first, the sovereign; secondly, the lords spiritual and temporal, which is an aristocratical assembly of persons selected for their piety, their birth, their wisdom, their valour, or their property; and, thirdly, the House of Commons, freely chosen by the people from among themselves, which makes it a kind of democracy; and as this aggregate body, actuated by different springs, and attentive to different interests, composes the British parliament, and has the supreme disposal of every thing; there can no inconvenience be attempted by either of the three branches, but will be withstood by one of the other two; each branch being armed with a negative power, sufficient to repel any innovation which it shall think inexpedient or dangerous.

Here then is lodged the sovereignty of the British constitution; and lodged as beneficially as is possible for society. For in no other shape could we be so certain of finding the three great qualities of government so well and so happily united. If the supreme power were lodged in any one of the three branches separately, we must be exposed to the inconveniences of either absolute monarchy, aristocracy, or democracy: and so want two of the three principal ingredients of good polity; that is, virtue, wisdom

(g) "*Cunctas nationes et urbes quam evenire, vel, si evenit, haud populus, aut primores, aut singuli regunt: delecta ex his et constituta reipublicæ forma laudari facilius* quam evenire, vel, si evenit, haud diuturna esse potest."—Ann. lib. iv. c. 33.

[and power. If it were lodged in any two of the branches—for instance, in the sovereign and House of Lords—our laws might be providently made, and well executed, but they might not always have the good of the people in view: if lodged in the sovereign and commons, we should want that circumspection and mediatory caution, which the wisdom of the peers is to afford: if the supreme rights of legislature were lodged in the two houses only, and the crown had no negative upon their proceedings, they might be tempted to encroach upon the royal prerogative or perhaps to abolish the royal office, and thereby weaken (if not totally destroy) the strength of the executive power. But the constitutional government of this island is so admirably tempered and compounded, that nothing can endanger or hurt it, but destroying the equilibrium of power between one branch of the legislature and the rest. For if ever it should happen that the independence of any one of the three should be lost, or that it should become subservient to the views of either of the other two, there would soon be an end of our constitution. The legislature would be changed from that which (upon the supposition of an original contract, either actual or implied) is presumed to have been originally set up by the general consent and fundamental act of the society: and such a change, however effected, is, according to Mr. Locke, (who perhaps carries his theory too far,) at once an entire dissolution of the bands of government; and the people are thereby reduced to a state of anarchy, with liberty to constitute to themselves a new legislative power (*h*).

Having thus cursorily considered the three usual species of government, and our own singular constitution selected and compounded from them all, we are now to remark that, as the power of making laws constitutes the supreme authority, so wherever the supreme authority in any state

(*h*) On Government, part 2, § 212.

[resides, it is the right of that authority to make laws; that is, in the words of our definition, *to prescribe the rule of civil action*. And this may be discovered from the very end and institution of states. For a state is a collective body, composed of a multitude of individuals, united for their safety and convenience, and intending to act together as one man. If it therefore is to act as one man, it ought to act by one uniform will. But, inasmuch as political communities are made up of many natural persons, each of whom has his particular will and inclination, these several wills cannot by any natural union be joined together, or tempered and disposed into a lasting harmony, so as to constitute and produce one uniform will of the whole. It can therefore be not otherwise produced than by a political union; by the consent of all persons to submit their own private wills to the will of one man, or of one or more assemblies of men, to whom the supreme authority is entrusted: and this will of that one man, or assemblage of men, is in different states, according to their different constitutions, understood to be *law*.

Thus far, as to the right of the supreme power in a state to make laws; but farther, it is its duty likewise. For since the respective members are bound to conform themselves to its will, it is expedient that they receive directions from the state declaratory of that will. But as it is impossible in so great a multitude to give injunctions to every particular man, relative to each particular action, it is therefore incumbent on the state to establish general rules, for the perpetual information and direction of all persons in all points, whether of positive or of negative duty. And this, in order that every man may know what to look upon as his own, what as another's; what absolute and what relative duties are required at his hands; what is to be esteemed honest, dishonest or indifferent; what degree every man retains of his natural liberty; what he has given up as the price of the benefits of society; and after what manner each person is to moderate the use and exercise of

[those rights which the state assigns him, in order to promote and secure the public tranquillity.

Municipal law, in a general point of view, may be said to consist of several parts: one, *declaratory*,—whereby the rights to be observed, and the wrongs to be eschewed, are clearly defined and laid down: another *directory*,—whereby the subject is instructed and enjoined to observe those rights, and to abstain from the commission of those wrongs: a third, *remedial*,—whereby a method is pointed out to recover a man's private rights, or redress his private wrongs: to which may be added—in case of a law by which any public wrong is prohibited, or public duty enjoined—a fourth, viz., the part which contains the *sanction*, that is, the provision for enforcing or promoting its observance.

With regard to the first of these, the *declaratory* part of municipal law, this depends not so much upon the law of revelation or of nature, as upon the wisdom and will of the legislator; and this doctrine, which before was slightly touched upon, deserves a more particular explication. Those rights then which may be called natural rights, such as life and liberty, need not the aid of human laws to be effectually invested in every man; neither do they receive any material increase of strength when declared by the municipal laws to be inviolable. On the contrary, no human legislature can justifiably abridge or destroy them, unless the owner shall himself commit some act that amounts to a forfeiture. Neither do natural duties (such, for instance, as the worship of God, the maintenance of children, and the like) receive a much stronger sanction from being also declared to be duties by the law of the land. The case is the same as to crimes *mala in se*, such as murder, theft, and perjury; which contract but little additional turpitude from being declared unlawful by the legislature of a state. For that legislature in all these cases acts only, as was before observed, in subordination to the great Lawgiver, transcribing and publishing his precepts. So that, upon the whole, the declaratory part of the

[municipal law has very little force or operation with regard to actions that are naturally and intrinsically right or wrong.

But, with regard to things in themselves indifferent, the case is entirely altered. These become either right or wrong, just or unjust, duties or misdemeanors, according as the municipal legislator sees proper for promoting the welfare of the society, and more effectually carrying on the purposes of civil life. And sometimes, where the thing itself has its rise from the law of nature, the particular circumstances and mode of doing it become right or wrong, as the laws of the land shall direct. Thus, for instance, in civil duties,—obedience to superiors is the doctrine of revealed as well as of natural religion: but who those superiors shall be, and in what circumstances, or to what degrees, they shall be obeyed, it is the province of human laws to determine. And so, as to injuries or crimes, it must be left to our own legislature to decide in what cases the seizing another's cattle shall amount to a trespass or a theft; and where it shall be a justifiable action, as when a landlord takes them by way of distress for rent.

Thus much for the *declaratory* part of municipal law: and the *directory* stands much upon the same footing: for this virtually includes the former, the declaration being usually collected from the direction. The law that says "thou shalt not steal," implies a declaration that stealing is a crime. And we have seen that, in things naturally indifferent, the very essence of right and wrong depends upon the direction of the laws to do or to omit them.

The *remedial* part of a law is so necessary a consequence of the former two, that laws must be very vague and imperfect without it. For in vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights, when wrongfully withheld or invaded. This is what we mean properly, when we speak of the protection of the law. When, for instance, the declaratory part of the law has said, "that

[the field or inheritance, which belonged to Titius's father, is vested by his death in Titius ;" and the directory part has "forbidden any one to enter on another's property without the leave of the owner : " if Gaius after this will presume to take possession of the land, the remedial part of the law will then interpose its office ; will make Gaius restore the possession to Titius, and also pay him damages for the invasion.

With regard to the *sanction* of laws, it is observed, that human legislators have for the most part chosen to make it rather *vindictory* than *remuneratory*, or to consist rather in punishments, than in actual particular rewards. Because, in the first place, the quiet enjoyment and protection of all our civil rights and liberties, which are the sure and general consequence of obedience to the municipal law, are in themselves the best and most valuable of all rewards ; because, also, were the exercise of every virtue to be enforced by the proposal of particular rewards, it were impossible for any state to furnish stock enough for so profuse a bounty ; and farther, because the dread of evil is a much more forcible principle of human actions than the prospect of good (*i*). For which reasons, though a prudent bestowing of rewards is sometimes of exquisite use, yet we find that those civil laws, which enforce and enjoin our duty, do seldom, if ever, propose any privilege or gift to such as obey the law ; but do constantly come armed with a penalty denounced against transgressors, either expressly defining the nature and quantity of the punishment, or else leaving it to the discretion of the judges, and to those who are entrusted with the care of putting the laws in execution.

Laws attended with a vindictory sanction are said to *compel* and *oblige* : not that by any natural violence they so constrain a man, as to render it impossible for him to

(*i*) Locke on the Human Understanding, b. 2, c. 2.

[act otherwise than as they direct, which is the strict sense of obligation; but because, by declaring and exhibiting a penalty against offenders, they bring it to pass that no man can easily choose to transgress the law; since, by reason of the impending correction, compliance is in a high degree preferable to disobedience. And, even where rewards are proposed as well as punishments threatened, the obligation of the law seems chiefly to consist in the penalty; for rewards, in their nature, can only *persuade* and *allure*; nothing is *compulsory* but punishment.]

It is held by the soundest ethical writers, that there is also an obligation in point of conscience to observe the laws. It is related of Socrates, that he made a promise with himself to observe the laws of his country: and this is nothing more than what every man ought both to promise and to perform; and he ought also to promise that he will exert all his power to compel others to obey them (*k*). It has, indeed, been argued that this principle must be understood with some restriction, and that though it holds as to rights determined by law to exist, as to natural duties, and as to offences *mala in se*, yet that, with regard to those laws which enjoin only *positive* duties, or forbid things not *mala in se*, but *prohibita* merely, without any intermixture of moral guilt, conscience is no further concerned than by directing a submission to the penalty imposed for a breach of those laws (*l*). The distinction, however, will perhaps hardly bear the test of a close inquiry. To form a true judgment on the subject, it is necessary to take into consideration that the true principle both of moral and of positive laws is in effect the same, viz. utility, or the general welfare, and that disobedience to either sort of precept must be presumed to involve in it some kind of mischievous consequence. Supposing the existence of a law of the merely positive

(*k*) Note by Christian, to 1 Bl. Com. p. 59.

(*l*) 1 Bl. Com. 58.

class, which happens to be considered by the public at large as useless or even detrimental to society, yet a conscientious man will feel himself bound to observe it, if for no other reason, yet for this, that his taking the contrary course might encourage others to violate laws of a more beneficial character, and lessen the general reverence for the institutions of his country.

SECTION III.

OF THE LAWS OF ENGLAND.



Our plan now leads us to investigate the different parts of the laws of England; but before commencing this subject, connected as it is to some extent with the civil and canon laws, a general account of what is meant by those laws may be here desirable.

[By the *civil* law is generally understood the municipal law of the Roman empire, as comprised in the Institutes, the Code, and the Digests of the Emperor Justinian, and the Novel Constitutions of himself and some of his successors; and of this body of law the following is a short and general account (*a*).

The Roman laws—founded, first upon the regal constitutions of their antient kings, next upon the twelve tables of the *decemviri*, then upon the laws or statutes enacted by the senate or people, the edicts of the prætor, and the *responsa prudentum*, or opinions of learned lawyers, and lastly upon the imperial decrees, or constitutions of successive emperors,—had grown to so great a bulk, or, as Livy expresses it, “*tam immensus aliarum super alias accervatarum legum cumulus*” (*b*), that they were computed to be many camels’ load by an author who preceded Justinian (*c*). This was in part remedied by the col-

(*a*) Ample information on this subject will be found in Vinnius on the Institutes, Voet on the Pandects, Perezius on the Code, and in the works of Bynkershoeck, Heineccius, and Pothier; and their researches have been followed up

by numerous modern writers, amongst whom we will content ourselves with mentioning the names of Kent and Savigny.

(*b*) L. 3, c. 34.

(*c*) See Taylor’s Elements of Civil Law, 17.

[lections of three private lawyers, Gregorius, Hermogenes, and Papirius; and then by the Emperor Theodosius the younger, by whose orders a code was compiled A.D. 438, being a methodical collection of all the imperial constitutions then in force; which Theodosian code was the only book of civil law received as authentic in the western part of Europe till many centuries after (*d*); and to this it is probable that the Franks and Goths might frequently pay some regard, in framing legal constitutions for their newly erected kingdoms: for Justinian commanded only in the eastern remains of the empire; and it was under his auspices that the present body of civil law was compiled and finished by Tribonian and other lawyers, about the year 533.

This consists of, 1, The Institutes, which contain the elements or first principles of the Roman law, in four books (*e*). 2. The Digests, or Pandects, in fifty books; containing the opinions and writings of eminent lawyers, digested in a systematical method. 3. A New Code, or collection of imperial constitutions, in twelve books; the lapse of a whole century having rendered the former code of Theodosius imperfect (*f*). 4. The Novels, or new constitutions posterior in time to the other books, and amounting to a supplement to the code; containing new decrees of successive emperors, as new questions happened to arise (*g*).]

(*d*) This is at least true of the western part of Europe generally, as the code of Justinian was not recognized there generally till the twelfth century. But that code seems to have been recognized by the Roman Church, at least, much earlier. See Hallam's *Mid. Ag.* vol. iii. p. 513; and "*Histoire du Droit Romain au Moyen-Age*, par M. de Savigny," ch. xxii. ss. 164, 167.

(*e*) The Institutes of Justinian are chiefly founded on those of Gaius, and on the fragments of

Ulpian. The manuscript of Gaius was discovered accidentally by Niebuhr, in the year 1816, while at work in the library at Verona.

(*f*) It is called the "New Code," not in reference to the Theodosian code, but to a code which was promulgated by Justinian, but suppressed by him on the publication of the New Code.

(*g*) It is remarked by Lord Mackenzie in his *Studies on Roman Law* (p. 25), that Justinian himself is the author of most of the Novels, viz., of 154 out of 168.

These form the body of Roman law, or *corpus juris civilis*, as published about the time of Justinian; which, however, fell soon into neglect and oblivion, until, in the twelfth century, the policy of the Roman ecclesiastics began to give new vogue and authority to the civil law, introduced it into several nations, and occasioned that mighty inundation of voluminous comments, with which this system of law, more than any other, is now loaded.

[The *canon* law is a body of Roman ecclesiastical law, relative to such matters as that church either has, or pretends to have, the proper jurisdiction over (*i*). This is compiled from the opinions of the antient Latin fathers, the decrees of general councils, and the decretal epistles and bulls of the holy see; all which lay in the same disorder and confusion as the Roman civil law, till, about the year 1151, Gratian, an Italian monk, in imitation of Justinian's Pandects, reduced the ecclesiastical constitutions also into some method, in three books, which he entitled *Concordantia Canonum*, but which are generally known by the name of *Decretum Gratiani* (*k*). These reached as low as the time of Pope Alexander the third. The subsequent papal decrees, to the pontificate of Gregory the ninth, were published in much the same method, under the auspices of that pope, about the year 1230, in five books, entitled *Decretalia Gregorii Noni*. A sixth book was added by Boniface the eighth about the year 1298, which is called *Sextus Decretalium*. The Clementine Constitutions, or decrees of Clement the fifth, were in like manner authenticated in 1317 by his successor John the twenty-second, who also published twenty constitutions of his own,

(*i*) A disquisition on this subject, including our national canon law, will be found in Reeves's Hist. Eng. Law. 4th vol. chapters xxiv., xxv.; and see Robertson's Chas. V. vol. i. n. 24.

(*k*) It is said by Dr. Burn, in

the Preface to his "Ecclesiastical Law," p. xx., that the "decrees" of the canon law, having first been collected by Ivo in the year 1114, were afterwards "polished and perfected by Gratian, a monk of Bononia, in the year 1149."

[called the *Extravagantes Joannis*; all which in some measure answer to the Novels of the civil law. To these have been since added some decrees of later popes, in five books, called *Extravagantes Communes*: and all these together, Gratian's Decree, Gregory's Decretals, the Sixth Decretal, the Clementine Constitutions, and the Extravagants of John and his successors, form the *corpus juris canonici*, or body of the Roman canon law.

Besides these pontifical collections, which, during the times of popery, were received as authentic in this island as well as in other parts of Christendom, there is also a kind of national canon law, composed of *legatine* and *provincial* constitutions, and adapted only to the exigencies of our own church and kingdom (*l*). The *legatine* constitutions are ecclesiastical laws, enacted in *national* synods held under the Cardinals Otho and Othobon, legates from Pope Gregory the ninth and Pope Clement the fourth, in the reign of King Henry the third, about the years 1220 and 1268 (*m*). The *provincial* constitutions are principally the decrees of *provincial* synods, held under divers archbishops of Canterbury, from Stephen Langton, in the reign of Henry the third, to Henry Chichele, in the reign of Henry the fifth; and adopted also by the province of York in the reign of Henry the sixth (*n*). At the dawn of the Reformation, it was enacted by statute 25 Hen. VIII. c. 19, that a review should be had of the canon law: and that, till such review should be made, all canons, constitutions, ordinances, and synodals provincial, being then already made and not repugnant to the law of the land or the king's prerogative, should still be used and executed (*o*).]

(*l*) See Hist. Eng. Law, by Reeves, vol. ii. p. 78.

(*m*) On these constitutions Athon is the chief commentator. See Pref. to Burn's Ecclesiastical Law, p. xxii.

(*n*) Ibid. Lyndwode's Provinciale is the chief work of authority

on the provincial constitutions. (See Reeves, vol. iv. p. 117.)

(*o*) See also three temporary statutes to the same effect, viz., 27 Hen. 8, c. 15; 35 Hen. 8, c. 16, and 3 & 4 Edw. 6, c. 11. The 25 Hen. 8, c. 19, was revived and confirmed by 1 Eliz. c. 1.

And, as no such review has yet been perfected (*p*), it would seem that upon this enactment depends the authority of the canon law in England, the limitations of which appear upon the whole to be as follows,—that no canon contrary to the common or statute law, or the prerogative royal, is of any validity; that, subject to this condition, the canons made anterior to the parliamentary provision above mentioned, and adopted into our system (for there are some which have had no reception among us), are binding both on clergy and laity; but that canons made since that period, as they have had no sanction from parliament, are, as regards the laity at least, of no force (*q*).

[Accordingly, with regard to those canons in particular which were enacted by the clergy in convocation under James the first, in the year 1603, and which were never confirmed in parliament, but sanctioned by the king's charter only (*r*), it has been solemnly adjudged upon the principles of law and the constitution, that where they are not merely declaratory of the antient canon law, but are introductory of new regulations, they do not bind the laity, whatever regard the clergy may be bound to pay to them (*s*).]

To proceed, then, to the subject now before us, we

(*p*) See Watson's Cl. Law, ch. iii. p. 17. 3rd ed.; Burnet's Hist. Reform., vol. ii. p. 197; Adams' Relig. World, vol. i. p. 411.

(*q*) See *Candrey's case*, 5 Rep. xxxii.; 12 Rep. 72; Co. Litt. 344 a; Pref. to Burn's Ecc. Law; *Wolferstan v. Bishop of Lincoln*, 2 Wils. 174; *Middleton v. Croft*, Stra. 1056; 2 Atk. 659, 669; *Alston v. Atlay*, 7 Ad. & El. 289.

(*r*) *Middleton v. Croft*, ubi sup. These are 141 in number, and are a collection out of the several preceding canons. They are intituled "Constitutions and Canons Eccle-

siastical treated upon by the Bishop of London, President of the Convocation, &c., and agreed upon with the King's Majesty's Licence, in their Synod begun at London, A.D. 1603, in the first year of King James." They constitute the present standard of the Church of England.

(*s*) See *Middleton v. Croft*, ubi sup.; *More v. More*, 2 Atk. 158; *Bishop of St. David's v. Lucy*, Carth. 485; *Rex v. Bishop of Lichfield*, 2 W. Bla. 968; *Marshall v. Bishop of Exeter*, Law Rep., 3 H. of L. Cas. 17.

may, for our present purpose, divide the “municipal law of England,” or the rule of civil conduct prescribed to the inhabitants of this kingdom, into two kinds: the *lex non scripta*, the unwritten (or common) law; and the *lex scripta*, the written (or statute) law.

[With regard to our “unwritten” law, it is not, however, to be understood that the whole of it is at present merely *oral*, or communicated to us from the former ages to the present solely by word of mouth. It is true, indeed, that in the profound ignorance of letters which formerly overspread the whole western world, all laws were entirely traditional; for this plain reason, because the nations among which they prevailed had but little idea of writing. Thus the British as well as the Gallic druids committed all their laws as well as learning to memory (*t*); and it is said of the primitive Saxons here, as well as their brethren on the continent, that *leges solâ memoriâ et usu retinebant* (*u*). But with us, at present, the monuments and evidences of our legal customs are contained in the records of the several courts, in books of reports and judicial decisions, and in the treatises of learned sages of the profession, preserved and handed down to us from the times of highest antiquity. And these parts of our law are styled *leges non scriptæ*, because their original institution and authority are not set down in writing, as acts of parliament are; but they receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom.

Our antient lawyers, and particularly Fortescue (*x*), insist with abundance of warmth, that these customs are as old as the primitive Britons, and continued down, through the several mutations of government and inhabitants, to the present time, unchanged and unadulterated. This may be the case as to some; but the assertion (as observed by Selden) must be understood with many grains

(*t*) Cæs. de B. G. lib. 6, c. 13.

(*x*) C. 17.

(*u*) Spelm. Gl. 362.

[of allowance; and ought only to signify, as the truth seems to be, that there never was any formal exchange of one system of laws for another; though doubtless the Romans, the Picts, the Saxons, the Danes, and the Normans, must have insensibly introduced and incorporated successively many of their own customs with those that were before established (*y*); thereby, in all probability, improving the texture and wisdom of the whole by the accumulated wisdom of divers particular countries. Our laws, saith Lord Bacon, are mixed as our language (*z*); and as our language is so much the richer, the laws are the more complete.

And indeed our early historians do positively assure us, that our body of laws is of this compounded nature. For they tell us that in the time of Alfred the local customs of the several provinces of the kingdom were grown so various, that he found it expedient to compile a *Dom-boc* or *Liber Judicialis*, digesting them into one uniform code of laws for the general use of the whole kingdom; and this book is said to have been extant so late as the reign of king Edward the fourth, but to have been since lost; it probably contained the principal maxims of the common law, the penalties for misdemeanors, and the forms of judicial proceedings (*a*).

The irruption and establishment of the Danes in England, which followed soon after, introduced new customs,

(*y*) Mr. Spence, in his "*History of the Equitable Jurisdiction of the Court of Chancery*," insists that the most important part of the common law is a legacy from the Romans.

(*z*) See his *Proposals for a Digest*.

(*a*) 1 Bl. Com. 65. In the opinion, however, of Mr. Hallam (*Midd. Ages*, vol. ii. p. 402, 7th ed.) there is no sufficient proof that Alfred "compiled a *dom-boc*, or general code for the government of his kingdom." Turner (in his

Hist. Ang.-Sax. vol. ii. p. 149, 6th ed.) considers the *dom-boc* as the same with the laws of Alfred, in the *Leges Anglo-Sax.* published by Wilkins. A document called "*Alfred's Dooms*" was printed by the Record Commissioners in 1840, but Sir F. Palgrave remarks, that it is insufficient to support the assertions of Blackstone as to Alfred's achievements as a law compiler (*Rise, &c. of the British Commonwealth*, c. 11).

[and caused this code of Alfred in many provinces to fall into disuse, or at least to be mixed and debased with other laws of a coarser alloy ; so that about the beginning of the eleventh century, there were three principal systems of laws prevailing in different districts: 1. The *Mercen-Lage*, or Mercian laws, which were observed in many of the midland counties, and those bordering on the principality of Wales, the retreat of the antient Britons ; and which were therefore very probably intermixed with the British or Druidical customs. 2. The *West-Saxon Lage*, or laws of the West-Saxons, which obtained in the counties to the south and west of the island, from Kent to Devonshire. These were probably much the same with the laws of Alfred above mentioned ; being the municipal law of far the most considerable part of his dominions, and particularly including Berkshire, the seat of his peculiar residence. 3. The *Dane-Lage*, or Danish law, which was principally maintained in the rest of the midland counties, and also on the eastern coast, (the part most exposed to the visits of the Danes,) the very northern provinces being at that time under a distinct government (*b*).

Out of these three systems of laws, Roger Hoveden and Ranulphus Cestrensis inform us, that King Edward the Confessor extracted one uniform law, or digest of laws, to be observed throughout the whole kingdom ; though the work had also been projected and begun by his grandfather king Edgar. And indeed a general digest of the same nature has been constantly found expedient, and therefore put in practice by other great nations, which were formed from an assemblage of little provinces governed by peculiar customs (*c*). However, these undertakings of

(*b*) 1 Bl. Com. 65. For this he cites Sir M. Hale, Hist. C. L. c. 3.

(*c*) Blackstone (vol. i. p. 66) instances the Portuguese code completed in the fifteenth century, the Spanish code entitled *Las Partidas*,

collected by Alonzo the tenth, in the year 1250, and the collection of the *land's lagh* in Sweden made about the same period, and he cites Mod. Un. Hist. xx. 211 ; xxii. 135 ; xxxiii. 21, 58.

[king Edgar and Edward the Confessor were probably no more than a new edition, or fresh promulgation, of Alfred's code or Dom-boe, with such additions and improvements as the experience of a century and a half had suggested. For Alfred is generally styled by the same historians the *legum Anglicanarum conditor*, as Edward the Confessor is the *restitutor*.]

But whatever may be thought of these points of legal history or tradition, there can be no doubt that, under the first princes of the Norman line, our ancestors were engaged in a frequent struggle to maintain certain institutions known by the appellation of the "laws of Edward the Confessor," and which would seem to have been a body of laws or customs observed (though not first established) in the reign of that monarch (*d*); and it is certain that the Norman princes made frequent engagements to restore and maintain these laws as the most popular act they could do, when pressed by foreign emergencies or domestic discontents. Nor is it unreasonable to believe that these, or some other remains of the law established in this country before the Conquest, gave rise (in part at least) to that collection of maxims and customs which is now known by the name of the common law (*e*); a name either given to it in contradistinction to other laws,—as the statute law, the civil law, the law merchant, and the like—or more probably, as a law common to all the realm.

To assign however to the common law no other original than this, would be to take an imperfect and erroneous view of the subject. Our system of tenures was chiefly

(*d*) The laws so called, contained in Lambard and Wilkins, are considered spurious. (See Hallam's *Mid. Ages*, vol. ii. p. 444, 7th edit.)

(*e*) That much of our common law was in force in this island before the Conquest is maintained both by Hale and Blackstone. And

the historian of the Middle Ages, though inclined in general to ascribe our common law to a date not much antecedent to the publication of Glanville (temp. Hen. 2), yet admits that "some features of it "may be distinguishable in Saxon "times." (Hallam, *ubi sup.*, pp. 466, 468, 7th ed.)

constructed, if not first founded, by the Norman conqueror (*f*); our antient judicial forms and pleadings, while they have nothing in common with the Anglo-Saxon style, are in striking conformity with the Norman; and it has been remarked with great truth, that the general language of our jurisprudence and its terms of art are exclusively of French extraction (*g*). We cannot hesitate therefore to recognize in the antient law of Normandy another parent of the common law, and one from which it has inherited some of its most remarkable features (*h*).

But though these are the most likely foundations of this collection of maxims and customs, yet the maxims and customs, so collected, are of a higher antiquity than memory or history can reach (*i*): nothing being more difficult than to ascertain the precise beginning and first spring of an antient and long-established custom. For which reason it is that, in our law, the goodness of a custom depends upon its having been used time out of mind; or, in the solemnity of our legal phrase, “time whereof the memory of man runneth not to the contrary,”

(*f*) 2 Bl. Com. 48; Henry, Hist. of Eng. vol. vi. pp. 10, 18; Hist. Eng. Law, by Reeves, vol. i. p. 28, 3rd edit.; Hallam's Midd. Ages, vol. ii. p. 408.

(*g*) “*Omnia vocabula, quæ vocabula artis dicuntur, quibusque hodie in foro Angli utuntur, Gallica sunt; nihilque cum Saxonica lingua habent affine.*”—Craig, Jus Feud. lib. i. s. 7.

(*h*) The similarity of the English and Norman laws is strongly illustrated by a comparison of the Grand Coustumier of Normandy (compiled as late as Ric. I. and probably later), with our Glanville, who wrote in the reign of Hen. II. This subject is discussed by Hale in Hist. C. L.

c. 6, who, jealous for the originality of the English law, argues from the posteriority in date of the Grand Coustumier, that, in most of the particulars where the conformity is to be traced, the merit of the first introduction presumably belongs to England, though he admits the reasonableness of assigning it in others to Normandy. It does not, however, seem very material in which of the two countries they were first established. They have at all events no resemblance to the Anglo-Saxon institutions, and are evidently due to lawyers of the Norman school.

(*i*) Hale, ubi sup. c. 3.

a phrase which refers, however, (it is to be observed,) in our law to a fixed era, and means that the custom must appear (for anything that can be proved to the contrary) to have been in use before the commencement of the reign of Richard the first (*k*). It is this antiquity that gives it its weight and authority; and of this nature are the maxims and customs which compose the common law, or *lex non scripta*, of this kingdom.

It has already been remarked that the Romans were amongst the many founders of our common law, by the gradual incorporation of their own customs with those they found established here (*l*); but besides this, there are subjects,—viz. matters maritime and such as relate to the Church (*m*),—with regard to which some of the principles of the civil and canon law have been introduced into the law administered by those of our courts which have jurisdiction to entertain such matters. As to the former of these subjects, the distinction which exists between proceedings *in personam* and proceedings *in rem* will serve to illustrate our meaning. For in case of a collision between two vessels on inland waters, all that the owner of the one can do is to sue the owner of the other and recover damages for the injury he has suffered. But if the collision took place on the “high seas” over which the Admiralty jurisdiction extends, the owner of the injured vessel might (by a procedure borrowed from the civil law) sue the vessel in fault, cause it to be arrested, and, unless released on bail, sell it to satisfy his judgment (*n*). Thus, also,—in matters relating to the Church,—the ecclesiastical courts may in certain cases pronounce sentence of *excommunication*, a

(*k*) See the preamble to stat. 2 & 3 Will. 4, c. 71; Co. Litt. 116 a; *Jenkins v. Harvey*, 5 Tyrw. 396.

(*l*) Vide sup. p. 44.

(*m*) Blackstone (vol. i. p. 83) refers also to the *military* and the *university* courts. The former are out of use. As to the latter, see

25 & 26 Vict. c. 26, s. 12, and University Commission Report, p. 5.

(*n*) See Supreme Court of Judicature Act, 1875 (38 & 39 Vict. c. 77); App. A., Part I., No. 11, Orders and Rules of 1883, “Writ of Summons in Admiralty action *in rem*.”

power derived from the canon law and still exercisable, but in some few cases only, and only as defined by statute (o).

[It is further to be observed that those portions of the civil and canon law which thus, in the sense above explained, form part of our own, are properly ranked under the head of *leges non scriptæ* or unwritten laws, although (as we have seen) they are set forth by authority in pandects, codes, and institutions, and are enforced by an immense number of expositions, decisions, and treatises of the learned in both branches of the law. But it is not on account of their being *written* laws that either the canon law, or the civil law, have any obligation within this kingdom: neither do their force and efficacy depend upon their own intrinsic authority; which is the case of our written laws, or acts of parliament. They bind not the subjects of England, because their materials were collected from popes or emperors, were digested by Justinian, or declared to be authentic by Gregory. These considerations give them no authority here; for the legislature of England doth not, nor ever did, recognize any foreign power as superior or equal to it in this kingdom, or as having the right to give law to any, the meanest of its subjects. But all the strength that either the papal or imperial laws have obtained in this realm is only because they have been admitted and received by immemorial usage and custom in some particular cases, and some particular courts, where they form a branch of the *leges non scriptæ*, or customary laws; or else because they are in some other cases introduced by consent of parliament; and then they owe their validity to the *leges scriptæ*, or statute law. This is expressly declared in those remarkable words of the statute 25 Hen. VIII. c. 21, addressed to the king's royal majesty: "For this your grace's realm, recognizing no superior
"under God but only your grace, hath been and is free

(o) See 53 Geo. 3, c. 127.

[" from subjection to any man's laws, but only to such as
" have been devised, made, and ordained *within* this realm,
" for the wealth of the same; or to such other as, by
" sufferance of your grace and your progenitors, the people
" of this your realm have taken at their free liberty, by
" their own consent, to be used among them; and have
" bound themselves by long use and custom to the ob-
" servance of the same; not as to the observance of the
" laws of any foreign prince, potentate, or prelate; but as
" to the *accustomed* and antient laws of this realm, origin-
" ally established as laws of the same, by the said suffer-
" ance, consent, and custom; and none otherwise."]

Our unwritten or common law is distinguishable into I. General customs, which are the universal rule of the whole kingdom; and II. Particular customs, which affect only the inhabitants of particular districts.

I. [As to general customs, or the common law, properly so called, this is that law by which proceedings and determinations in the courts of justice are principally guided and directed; this, for the most part, settles the course in which lands descend by inheritance; the manner and form of acquiring and transferring property; the solemnities and obligations of contracts; the rules of expounding wills, deeds, and acts of parliament; the respective remedies for civil injuries; and an infinite number of minuter particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires (*p*). Thus, for example, that the eldest son alone is heir to his ancestor;—that a deed is of no validity unless sealed and delivered;—that wills shall be construed more favourably, and deeds more strictly;—these, and many others which might be instanced, are doctrines that are not set down in any written statute or ordinance; but depend merely upon immemorial usage, that is, upon common law, for their support.

[Some have divided the common law into two principal grounds or foundations: viz., *customs*; and *maxims*. But the authority of the maxims (such, for example, as “the king can do no wrong,” “no man shall be bound to accuse himself,” and the like) rests entirely upon general reception and usage, like customs do; also, the mode of proving a maxim to be a rule of the common law, is by showing that it hath been always the custom to observe it.

And here a very natural, and very material, question arises: how are these general customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the judges of the land. They are the depositaries of the laws; the living oracles, who must decide in all cases of doubt, and according to the law of the land,—their knowledge of which is derived from experience and study; from the “*viginti annorum lucubrationes*,” which Fortescue mentions (*q*); and from being long personally accustomed to the judicial decisions of their predecessors. And indeed these judicial decisions are the most authoritative evidence of the existence of the common law. The judgments themselves also, together with (until recently) the pleadings in the action (but which latter are now only filed), are carefully registered and preserved under the name of *records*, in public repositories set apart for that particular purpose (*r*); and to them frequent

(*q*) Cap. 8.

(*r*) As to records, see Co. Litt. 260 a, and the note by Mr. Hargrave. By stat. 1 & 2 Vict. c. 94, and 12 & 13 Vict. c. 101, s. 16, the public records of the kingdom are placed under the superintendence of the Master of the Rolls for the time being, and a Public Record Office has been established. To this office has also been transferred the whole of the deeds, books, documents, and papers belonging to the suitors in the Court of Chancery

(40 & 41 Vict. c. 55), and which were formerly in the custody of the Masters in Chancery, and had meanwhile been transferred to the custody of the clerks of records and writs in the said Court (23 & 24 Vict. c. 149),—which clerks have now been transferred to, and their offices amalgamated with, the Central Office of the Supreme Court of Judicature, commonly called the Central Office (42 & 43 Vict. c. 78, ss. 4—6).

[recourse is had, when any critical question arises, in the determination of which former precedents may give light or assistance (*s*). And therefore, even so early as the Conquest, we find the "*præteritorum memoria eventorum*" reckoned up as one of the chief qualifications of those, who were held to be "*legibus patriæ optime instituti*" (*t*), while at the same time it has been uniformly considered to be the duty of those who administer the law, to conform to the precedents thus established. For the scale of justice is not intended to waver with every new judge's opinion, but when in any case the law has been solemnly declared and determined, what before was uncertain is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law but to maintain and expound the old one. But in order to vindicate the old one from misrepresentation, if it be found that any former decision as reported is manifestly absurd or unjust, the judges will subsequently declare, not that such a sentence was *bad law*, but that it was *not law*; in other words, that it is not the established custom of the realm, as has been erroneously determined or reported. And here we may observe that our lawyers have been always copious in their encomiums on the reason of the common law; their doctrine being that law is the perfection of reason, and that what is not reason is not law. In accordance with which, a presumption always obtains in favour of an antient and established rule, the reason of which cannot at this distance of time be precisely assigned, that it is really founded on just and solid views; and in fact, whenever a standing rule of law, of which the reason perhaps cannot be discerned, hath been wantonly broken in upon by new resolutions, the wisdom

(*s*) Order LXI. rr. 28, 29 (1883); (*t*) Seld. Review of Tith. c. 8.
Order LXII. r. 2 (July, 1894).

[of the old rule hath in the end appeared from the inconveniences that have followed the innovation.]

It is to be observed, however, that many specific questions are perpetually occurring, in which the rule of the common law does not happen to be fixed by any known decision, and that these are disposed of by the judges in the manner that they think most conformable to the received rule in other analogous cases; or if there be no such analogy to guide them, then according to the natural reason of the thing; though (in deference to the principle already referred to, that the opinion of the judge is not to make the law, but only to ascertain it) their determination always purports to be declaratory of what the law *is*, and not of what it *ought* to be. It is obvious that, owing to the infinite variety of combinations in human affairs, questions of this novel description must frequently arise under every system of jurisprudence, with whatever prospective sagacity it may attempt to guard against them,—as in cases which turn on the exposition of the meaning of particular clauses in deeds or wills; and it is remarked by Sir Matthew Hale, that they are much better dealt with by a judge, than they could be by a merely learned or wise man not belonging to the profession of the law, who might be incompetent to understand even the technical terms employed in the instrument to be expounded, and at all events would be unable to reason from the analogy of other decided cases (*u*). To which it may be added, that, even in such of those questions as depend on reason only, the habit of solving them has an obvious tendency to improve the faculty; for practice makes perfect, in this as in most other matters.

[The decisions of the courts, being the best evidence of what the common law is, are held in the highest regard, and are not only preserved as authentic records in the treasuries of the several courts, but are handed out to

(*u*) Hist. C. L. c. 4.

[public view in the numerous volumes of *Reports* which furnish the lawyer's library. These reports are histories of the several cases, with a short summary of the proceedings, (which used to be preserved at large in the record,) and of the arguments on both sides, and of the reasons the court gave for its judgment; taken down in short notes by persons of skill present at the determination. And these serve as indexes to, and also to explain, the records; which always, in matters of consequence and nicety, the judges direct to be searched. The Reports are extant in a regular series from the reign of King Edward the second to that of Henry the eighth inclusive: and were taken by the prothonotaries, or chief scribes of the court, at the expense of the crown, and published *annually*; whence they are known under the denomination of the *Year Books* (*x*).] In the reign of the latter monarch, however, this series closed; and though afterwards King James the first, at the instance of Lord Bacon, appointed two reporters with a handsome stipend to perform the same duty, that institution was soon neglected (*y*); and from the reign of Henry the eighth the task of communicating to the public the decisions of the courts has been executed by private hands (*z*). Some

(*x*) The "Year Books" commence with the twentieth year of Edw. I., A.D. 1292.

(*y*) 1 Bla. Com. p. 72. In James the second's time, an order was issued to the Stationers' Company, to the effect that all books concerning the common laws of the realm were to be *licensed* by the Lord Chancellor or the judges or one of them. (See 1 Ld. Raym. 537; Burr. pref.) But the judges afterwards came to a resolution to grant licences no longer.

(*z*) It may be here remarked that at the present time there are, and for some time have been, five

series of reports of current decisions issued to the public, known respectively as the "Times Law Reports," the "Law Times Reports," the "Weekly Reporter" reports, the "Law Journal Reports," and "The Law Reports." The reports last named are published for the Incorporated Council of Law Reporting for England and Wales, established in the year 1866 (see the case of the Incorporated Council of Law Reporting for England and Wales, 22 Q. B. Div. 279). There are also "The Reports," and "The Revised Reports," independent series only recently commenced.

of the most valuable of the more antient reports are those by Lord Chief Justice Coke (*a*); a man of infinite learning in his profession, though not a little infected with the pedantry and quaintness of the times he lived in, which appear strongly in all his works. However, his writings are so highly esteemed, that they are generally cited without the author's name, and simply as *the Reports* (*b*). He had been preceded as a reporter by Dyer and Plowden, both lawyers of the highest eminence: of his successors (too numerous, especially in our own days, for distinct notice,) we will only mention the more antient and distinguished names of Hobart, Croke, Yelverton, Saunders, Vaughan and Levinz (*c*).

Besides the reporters, there are also other authors, to whom great veneration and respect is paid by the students of the common law. Such are Glanville and Bracton, who in the reigns of Henry the second and Henry the third respectively wrote treatises on the law of England; the author of *Fleta*, who composed a work on the same subject in the time of Edward the first (*d*); the author of

(*a*) The first eleven parts only were published in Coke's lifetime, at various periods between 1600 and 1615;—the twelfth and thirteenth being posthumous.

(*b*) His reports, for instance, are styled, κατ' ἐξοχὴν, "the Reports," and in quoting them, we usually say, 1 or 2 Rep., not 1 or 2 Coke's Rep. as in citing other authors; and "*the reports*" of modern commencement referred to in the footnote last but one above, are not to be confused therewith. The Reports of Judge Croke are also cited in a peculiar manner, by the names of those princes in whose reigns the cases reported in his three volumes were determined; viz. Queen Elizabeth, King James and King Charles the first; as well as by the number

of each volume. For sometimes we call them 1, 2 and 3 Cro., but more commonly Cro. Eliz., Cro. Jac. and Cro. Car.

(*c*) The reports of Saunders were edited in 1799 by Mr. Serjeant Williams, a profound lawyer, who appended to them notes (or rather legal dissertations) of a very instructive character. His edition was afterwards republished by Sir John Patteson and Sir E. V. Williams (then both at the bar) as joint editors, and still more recently by Sir E. V. Williams alone, before his elevation to the bench; and these editors added excellent annotations of their own to the former stock.

(*d*) The author is unknown; the title of the work is derived from its

the *Mirror*, a work generally ascribed to the reign of Edward the second (*e*); Fortescue, who wrote *De Laudibus Legum Angliæ* in the reign of Henry the sixth; St. German, who composed the treatise on the grounds of the laws of England called the *Doctor and Student*, in the reign of Henry the eighth; Staundforde, whose work on the criminal law was published about the time of Philip and Mary, and who was followed in that track by Hale and Hawkins early in the last century; the author of *Sheppard's Touchstone*, who wrote on conveyances in the reign of James the first (*f*); Fitzherbert, Brooke and Rolle, who published abridgments or digests of the different titles of the law in the reigns of Henry the eighth, Elizabeth, and Charles the second respectively, and whom Viner, Comyns and Bacon afterwards succeeded (*g*); and Gilbert, among whose valuable works (the productions of the last century), we shall only mention the treatise on tenures and that on uses and trusts (*h*). These and many other methodical writers are of high and intrinsic authority in the courts of justice: but none of the class shines so

being written during the author's confinement in the Fleet Prison. *Reeves's Hist. Eng. Law*, vol. ii. p. 280. The work of Reeves just referred to (a production of our own times) is itself of high character, but less read perhaps than it deserves. Though its method is somewhat dry, its research and accuracy are exemplary; and a continuation of it to the present day (if executed with equal ability) would be of great service to every student of law or constitutional history.

(*e*) The authorship and even the date of this treatise, "*The Mirror of Justices*," is uncertain. Some have pronounced it older than the Conquest, but it bears internal evidence of at least having been adapted to the time of Edward the

second. (See *Reeves's Hist. Eng. Law*, vol. ii. p. 358.) It is stated by Turner (*Hist. Ang. Sax. b. i. c. 3*) to have been written by Andrew Horne, temp. Edw. 2.

(*f*) The work has been attributed to Doderidge, a judge of great eminence. See Pref. to Hilliard's edition.

(*g*) See Mr. Hargrave's eulogium on Viner's Abridgment, and Comyns' Digest, Co. Litt. 9 a, n. (3), 17 a, n. (1).

(*h*) Chief Baron Gilbert's treatises were all published after the author's death, and in an unfinished state; but they are of a most learned and useful character. As to his treatise on tenures, see Butler's Pref. to Co. Litt.

conspicuously as the learned judge before mentioned, Sir Edward Coke; who in the year 1628 published four volumes of *Institutes*, as he is pleased to call them, though they have little of the institutional method to warrant such a title (*i*). [The first volume is a very extensive comment upon an excellent treatise of tenures, compiled by Judge Littleton in the reign of Edward the fourth. This comment is a rich mine of valuable common law learning collected and heaped together from the antient reports and year books, but greatly defective in method (*k*). The second volume is a comment upon many old acts of parliament, without any systematical order; the third is a more methodical treatise on the pleas of the crown; and the fourth is an account of the several species of courts (*l*).

And thus much for the first ground and chief cornerstone of the laws of England; which is general immemorial custom, or common law, from time to time declared in the decisions of the courts: which decisions are preserved among our public records, explained in our reports, and digested for general use in the authoritative writings of the venerable sages of the law.

If we turn for a moment to the law of Rome, from which, as already hinted, so much of our own has been drawn, we shall find that, though not to the extent which prevails in our system, it still, as practised in the times of its liberty, paid a great regard to custom, adopting it, when the written law was deficient, for reasons which will fully justify our practice of making it of equal authority with, when it is not contradicted by, the written law;

(*i*) See Butler's Pref. to *Co. Litt.*, where the reader will find some valuable observations on the celebrated commentary on Littleton, of which the First Institute consists, and also on the original work of Littleton.

(*k*) It is usually cited either by the name of *Co. Litt.* or as 1 *Inst.*

(*l*) These are cited as 2, 3 or 4 *Inst.* without any author's name; an honorary distinction which, as we before observed, is paid to the works of no other writer: the generality of reports and other tracts being quoted in the name of the compiler, as 2 *Ventris*, 4 *Leonard*, 1 *Siderfin*, and the like.

[“for since” (says Julianus, in the Digest,) “the written law binds us for no other reason but because it is approved by the judgment of the people, therefore those laws which the people have approved without writing ought also to bind every body. For where is the difference, whether the people declare their assent to a law by suffrage, or by a uniform course of acting accordingly?” (*m*).

With us, indeed, it would seem that the statute law and a very considerable portion of the common law both flowed originally from the same fountain,—a great part of the common law being referrible to some positive enactment of the supreme legislature, which has been lost and forgotten as such (*n*), and is now preserved as general custom only, that is, as unwritten common law.]

II. The second branch of the unwritten law of England consists of *particular* or *special customs* affecting only the inhabitants of particular districts (*o*): and a custom of this kind it is usual to designate by the word *custom* simply; which sufficiently distinguishes it from the general customs of which we have already spoken.

These particular customs, or some of them, are probably the remains of a multitude of local customs, prevailing, some in one part and some in another, over the whole of England, while it was broken into distinct dominions; and out of which, after it became a single kingdom, one common law was collected and made applicable to the realm at large; each district sacrificing some of its own special usages, in order that the whole kingdom might enjoy the benefit of one uniform and universal system of law. But, for reasons now long forgotten, particular counties, cities, towns, manors, and lordships were indulged with the privilege of abiding by their own customs, in contradistinction

(*m*) Ff. 1, 3, 32.

Hale's Hist. C. L. c. 4.

(*n*) See per Wilmot, C. J., Col-lins v. Blantern, 2 Wils. 351;

(*o*) Co. Litt. 110 b.; vide sup. p. 50.

to the rest of the nation at large, which privilege was confirmed to them in many instances by acts of parliament (*p*).

[Such is the custom of *gavelkind* obtaining in Kent, and some other parts of the kingdom, which ordains, among other things, that not the eldest son only of the father succeeds to his inheritance, but all the sons alike (*q*): and that, though the ancestor be attainted, yet the heir shall succeed to his estates, without any escheat to the Crown or to the lord (*r*). Such also is the custom that prevails in some antient boroughs, and therefore called *borough-English*, that the youngest son shall inherit the estate, in preference to all his elder brothers. Such is the custom which is found in certain boroughs that a widow shall be entitled, for her dower, to all her husband's lands; whereas, by the general law, she shall be endowed of one third part only. Such also are the special and particular customs of each manor, of which every one hears more or less, and which bind all the copyhold and customary tenants that hold of the said manor. Such, lastly, are many particular customs within the city of London, with regard to trade, apprentices, widows, orphans, and a variety of other matters. All these are more or less contrary to the general law, and are good only by special usage; though indeed in numerous cases, the customs have been also confirmed or preserved by act of parliament (*s*).] But the modern tendency of legislation, which is ever seeking to introduce simplicity or uniformity into the law, has been to abolish them; and therefore we find that, *e. g.*, all the special customs of the city of London, and of the city of York, so

(*p*) See Mag. Cart. 25 Edw. 1; 1 Edw. 3, st. 2, c. 9; 14 Edw. 3, st. 1, c. 1; 2 Hen. 4, c. 1.

(*q*) Co. Litt. 140 a.

(*r*) The doctrine of escheat on a conviction for felony is, however, now abolished altogether. (See 33

& 34 Vict. c. 23, s. 1.)

(*s*) See the City of London's case, 8 Rep. 126; *The King v. Bagshaw*, Cro. Car. 347; see also *Pulling on the Laws and Customs of London*, p. 2.

far as they related to the distribution of the estates of intestates, have been for some long time abolished (*t*).

To this head has also sometimes been referred that branch of the law which comprises the rules relative to bills of exchange, partnerships, and other mercantile matters, and which body of rules is generally denominated the *custom of merchants* (*u*), or the law merchant. As its character, however, is not local, nor its obligation confined to any particular district, it cannot with propriety be considered as a special custom in the technical sense to which we now refer (*x*). It is, in truth, a part of the general law of England (*y*): and it is distinguished by a separate name, because it applies, to the particular subjects in question, principles more or less different from those which the common law ordinarily recognizes in other matters; and also because these principles were engrafted into our municipal system by gradual adoption from the *lex mercatoria*, or general body of European usages in matters relating to commerce (*z*).

For the same reason the *usages of particular trades*, when not restrained to some limit in point of place, must be excluded from the technical idea of a custom. If there be any such usage of immemorial observance, and authenticated by judicial decision, it will form, according to our definition, part of the general law of England; if there be any sanctioned by act of parliament, it will constitute part of the statute law; but for the rest, the want of any peculiar locality determines them to be no customs, and they are consequently no rules of law at all. Yet, as

(*t*) 19 & 20 Vict. c. 94.

(*u*) 1 Bl. Com. 75.

(*x*) Co. Litt. 115 b.

(*y*) Per Holt, C. J., *Hussey v. Jacob*, Ld. Raym. 88; Per Forster, J., *Edie v. East India Company*, 2 Burr. 1226; 1 Bl. Rep. 299, S. C.; 2 Inst. 58; *Stone v. Rawlinson*,

Willes, 561. See also *Benson v. Chapman*, 8 C. B. (N. S.) 967, *in notis*.

(*z*) The *lex mercatoria*, or *law merchant*, is mentioned in some of our earlier statutes. (See 27 Edw. 3, st. 2, cc. 8, 19, 20.)

matters of *fact*, they are very necessary to be considered; for as the prevalence of any certain course of dealing among men leads to the presumption that in particular instances they intend to conform to it, the existence of such usages as these may often bear materially upon the question, whether an implied contract to the effect of the trade usage was not entered into between the parties; and also upon the question in what sense their express contract is to be understood; and these questions have recently received much attention from the courts in connection with transactions on the Stock Exchange (*a*).

The rules relating to particular or special customs regard either the proof of their existence, or their allowance as good and legal, when proved. And first we will consider the rules of *proof*.

As to the modes of descent in gavelkind, and borough-English, the law takes notice of them; and there is no occasion therefore to prove such customs, but only to prove that the lands in question are subject thereto (*b*). But with respect to most special customs, their existence must be shown, and not merely that the thing in dispute is within the custom. [The trial in both cases—both to show the existence of the custom, as, “that in the manor of Dale lands shall descend only to the heirs male, and never to the heirs female;” and also to show “that the lands in question are within that manor,”—is by a jury of twelve men, and not by the judges; unless the same custom has been before tried, determined, and recorded in the same court (*c*).

The customs of London, so far as they continue, differ

(*a*) Grissell *v.* Bristowe, Law Rep., 4 C. P. 36; Coles *v.* Bristowe, *ib.* 4 Ch. App. 3; Merry *v.* Nicholls, *ib.* 7 Ch. App. 733; Tomkins *v.* Lyon, 3 App. Ca. 213; Seymour *v.* Bridge, 14 Q. B. D. 460; Perry *v.* Barnett, 15 Q. B. D. 338; and see Easton *v.* London

Joint Stock Bank, 34 Ch. Div. 95; S. C. (*sub nom.* Earl of Sheffield *v.* London Joint Stock Bank) 13 App. Ca. 333.

(*b*) Co. Litt. 175; Year Book, 36 Hen. 6, 20, 21; see Consuet. Kantiæ (17 Edw. 2, st. 1, c. 16).

(*c*) Dr. & St. 1, 10.

[from all others in point of trial; for if the existence of the custom be brought in question, it shall not be tried by a jury, but by a certificate from the lord mayor and aldermen by the mouth of their recorder (*d*); unless indeed it be such a custom as the corporation is itself interested in—as a right of taking toll—for then the law permits them not to certify on their own behalf (*e*).

When a custom is actually proved to exist, the next inquiry is into the *legality* of it; for if it is not a good custom, it ought to be no longer used; “*Malus usus abolendus est*,” is an established maxim of the law (*f*).]

As to the legality of a custom, the following rules are established: 1. It must have been *used so long, that the memory of man runneth not to the contrary*. Upon this subject, however, it is material to recollect what has been before laid down, that the time of memory as regards the validity of a custom, or (as it is sometimes expressed) the time of *legal* memory, has received a peculiar technical limitation, and refers to so remote a date as the commencement of the reign of King Richard the first (*g*). So that if an usage can be shown to have first commenced at any time since that era, it is void as a custom; though, in the absence of such proof, its observance for a long time, and as far back as the evidence reaches, will amount to presumptive proof of its having prevailed during the whole period of legal memory (*h*). It is important also to bear in mind that this principle, by which a custom is required to be immemorial, is materially qualified in many cases by a modern statute, 2 & 3 Will. IV. c. 71; which, as to certain customary and prescriptive rights claimed

(*d*) See *Appleton v. Sloughton*, Cro. Car. 516; *Plummer v. Ben-
tham*, 1 Burr. 248; *Blacquiere v.
Hawkins*, Dougl. 378; *Westoby v.
Day*, 2 Ell. & Bl. 605; per Pollock,
C. B., in *Cox v. Mayor of London*,
1 Hurls. & Colt. p. 356.

(*e*) *Day v. Savadge*, Hob. 85.

(*f*) Litt. § 212; 4 Inst. 274.

(*g*) Co. Litt. 115 a; et vide sup.
p. 48.

(*h*) *Rex v. Joliffe*, 2 Barn. &
Cres. 54.

over the lands of other persons, (such as rights of common, or of way, and the like,) provides that these rights shall be deemed sufficiently established by proof of the uninterrupted enjoyment thereof *as of right* in some cases for thirty, in others for twenty years; and shall not be defeated (where such enjoyment can be proved) by showing merely that the enjoyment thereof commenced within the time of legal memory (*i*).

2. A custom must also have been *continued*. Any interruption would cause a temporary ceasing thereof, and the revival of it would give it a new beginning, which would be within the time of legal memory, and thereby the custom would be void. But this must be understood with regard to an interruption of the *right*; for a temporary interruption of the *possession* only will not destroy the custom (*k*). As if the inhabitants of a parish have a customary right of watering their cattle at a certain pool, the custom is not destroyed though they do not exercise the right for ten years; the right only becomes in such a case more difficult to prove: but if the *right* be anyhow discontinued, even for a day, the custom is quite at an end.

3. A custom must have been *peaceable*, and acquiesced in; not subject to contention and dispute (*l*). For customs seem to derive their authority from their allowance at some remote period, by common consent: and where the practice or usage has been immemorially disputed, the evidence of this consent is wanting (*m*).

4. [A custom must be *reasonable* (*n*); or rather, taken

(*i*) As to *prescription*, vide post, bk. II. pt. I. c. XXIII.

(*k*) Co. Litt. 114.

(*l*) Ibid.

(*m*) Vide sup. p. 58.

(*n*) See Year Book, 8 Edw. 4, 19; Litt. s. 212; Wilkes v. Broadbent, 1 Wils. 63; Bell v. Wardell, Willes, 202; Marquis of Salisbury v. Gladstone, 9 H. of Lords Cas.

692; Cox v. Mayor of London, 1 Hurls. & Colt. 338; Bryant v. Foot, Law Rep., 3 Q. B. 497; Lawrence v. Hitch, ib. 521; Mills v. Colchester, Law Rep. 2 C. P. 476; Bradburn v. Foley, 3 C. P. D. 129; Sowerby v. Coleman, Law Rep., 2 Exch. 96; Hall v. Nottingham, 1 Exch. D. 1.

[negatively, it must not be unreasonable. Which is not always, as Sir Edward Coke says, to be understood of every unlearned man's reason, but of artificial and legal reason, warranted by authority of law (*o*). Upon which account a custom may be good, though the particular reason of it cannot be assigned; for it sufficeth if no good legal reason can be assigned against it. Thus a custom in a parish that no man shall put his beasts into the common till the third of October, would be good; and yet it would be hard to show the reason why that day in particular is fixed upon, rather than the day before or after. But a custom, that no cattle shall be put in till the lord of the manor has first put in his, is unreasonable, and therefore bad: for peradventure the lord will never put in his, and then the tenants will lose all their profits (*p*).

5. A custom ought to be certain (*q*). A custom that lands shall descend to the most worthy of the owner's blood, is void; for how shall this worth be determined? but a custom to descend to the next male of the blood, exclusive of females, is certain, and therefore good (*r*). A custom to pay two-pence an acre in lieu of tithes, is good; but to pay sometimes two-pence, and sometimes three-pence, as the occupier of the land pleases, is bad for its uncertainty. Yet a custom to pay a year's improved value (or even two years' improved value) for a fine on a copyhold estate, is good; though the value is a thing uncertain: for the value may at any time be ascertained; and the maxim of law is, *id certum est quod certum reddi potest*.

6. A custom, though established by consent, must (when established) be *compulsory*; and not left to the option of every man, whether he may use it or no. Therefore a custom, that all the inhabitants shall be rated towards the maintenance of a bridge, will be good; but a custom, that

(*o*) Co. Litt. 62.

(*p*) Co. Coph. § 33.

(*q*) 1 Roll. Abr. 565; Selby v.

Robinson, 2 T. R. 758; Steel v.

Houghton, 1 Hen. Bl. 51.

(*r*) Roll. Abr. ubi sup.

[every man is to contribute thereto at his own pleasure, is idle and absurd, and indeed no custom at all.

7. Customs must be also *consistent* with each other ; one custom cannot be set up in opposition to another (*s*). For if both are really customs, then both are of equal antiquity, and both are equally established by mutual consent ; which to say of contradictory customs is absurd.] Therefore if a man should allege that as a fisherman he is entitled, by the custom of a certain place, to dry his nets upon another's land,—which in favour of fishing and navigation is a reasonable usage,—the latter could not allege, in opposition to this, a right by custom to remove the nets when so placed ; for these two contradictory customs cannot both be good, nor both stand together (*t*). But one custom may be subordinate to, and therefore controlled by, another custom ; and in this case, both customs may well stand together ; and where it is possible to do so, customs that are apparently in conflict, must be read so as to stand consistently together (*u*).

8. [It is also a rule that a custom in derogation of the general law, must be construed strictly (*v*). Thus, by the custom of gavelkind, an infant of fifteen years may by one species of conveyance, (called a deed of feoffment,) convey away his lands in fee simple, that is, for ever. But this custom does not empower him to use any other conveyance, for the custom must be strictly pursued.] Yet if there be a custom in a manor that a man may convey his copyhold in fee simple, this will also enable him to convey for life, or any other estate ; for the less is implied in the greater ; and though customs must be

(*s*) See Aldred's case, 9 Rep. 58 b ; Kenchin v. Knight, 1 Wils. 253 ; 1 Bl. Rep. 49, S. C. ; Parkin v. Radcliffe, 1 Bos. & Pull. 282.

(*t*) 1 Roll. Abr. 560 ; Hickman v. Thorne, 2 Mod. 104.

(*u*) Bateson v. Green, 5 T. R. 411 ; and see Brown's Scriven on Copyholds, 6th ed., p. 265.

(*v*) Arthur v. Bokenham, 11 Mod. 161 ; Denn v. Spray, 1 T. R. 466.

strictly, yet they need not in every case be literally, construed (*x*).

9. Lastly, it is to be understood that no custom can prevail against an express act of parliament (*y*). Therefore an alleged custom, that every pound of butter sold in a certain market must weigh eighteen ounces, was held to be void, on the ground that there was an act which directed that throughout the kingdom there should be sixteen ounces to the pound (*z*). And thus much for the second part of the *leges non scriptæ*, or those particular or special customs which affect particular districts only.

Let us next proceed to the *leges scriptæ*, the written laws of the kingdom (*a*); which are statutes, acts, or edicts, made by the sovereign, by and with the advice and consent of the lords spiritual and temporal, and commons, in parliament assembled (*b*). The oldest of these now extant and printed in our statute books is the famous *Magna Charta* of king John, as confirmed in parliament (*c*).

(*x*) Co. Cop. § 33. This limitation of the rule is noticed in Cole-ridge's Blackstone, vol. i. p. 79; and see *Denn v. Spray*, 1 T. R. 466.

(*y*) Co. Litt. 113 a.

(*z*) See *Noble v. Durell*, 3 T. R. 271.

(*a*) Vide sup. p. 43.

(*b*) *The Prince's Case*, 8 Rep. 20.

(*c*) 25 Edw. 1. The statutes from *Magna Charta* down to the end of Edw. 2—including also some which (because it is doubtful whether to assign them to the reign of Hen. 3, of Edw. 1, or of Edw. 2) are termed *incerti temporis*,—compose what have been called the *Vetera Statuta*; those from the beginning of the reign of Edw. 3 being contradistinguished by the appellation of the *Nova*

Statuta. (Dwarris on Statutes, 626.) It may be observed, that by 19 & 20 Vict. c. 64; 24 & 25 Vict. c. 101; 26 & 27 Vict. c. 125; 30 & 31 Vict. c. 59; 33 & 34 Vict. c. 69; 34 & 35 Vict. c. 116; 35 & 36 Vict. cc. 63, 97, 98; 36 & 37 Vict. c. 91; 37 & 38 Vict. cc. 35, 96; 38 & 39 Vict. c. 66; 39 & 40 Vict. c. 20; 41 & 42 Vict. c. 79; 42 & 43 Vict. c. 59; 44 & 45 Vict. c. 59; 46 & 47 Vict. c. 49; 50 & 51 Vict. c. 59; 51 & 52 Vict. cc. 3, 57; 53 & 54 Vict. cc. 33, 51; 54 & 55 Vict. c. 67; 55 & 56 Vict. c. 19; 56 & 57 Vict. cc. 14, 54; and 57 & 58 Vict. c. 56,—statutes which are commonly referred to as the Statute Law Revision Acts,—a variety of Acts not in use or in force, or now unnecessary, are expressly re-

The manner of making these statutes will be better considered hereafter, when we examine the constitution of parliament. At present we will only take notice of the different kinds of statutes; and of the rules of law with regard to their effect and construction (*d*).

First, as to their several kinds. Statutes are either *public* or *private* (*e*). Thus, the statute 13 Eliz. c. 10, which prohibits the master and fellows of any college, the dean and chapter of a cathedral, or any other person having a spiritual living, from making leases for longer terms than twenty-one years or three lives, is a public

pealed; and with a view to shortening the language of acts of parliament, various provisions are contained in the Interpretation Act, 1889 (52 & 53 Vict. c. 63), giving to short expressions (such as "Board of Trade," "High Court," &c.) the full effect of the longer expressions or descriptions formerly in use, and providing for the omission of the enacting words customarily repeated at the beginning of each section of the Act.

(*d*) The method of citing acts of parliament has been various. Many of the antient ones are called after the name of the place where the parliament was held that made them;—as the statutes of Merton, of Westminster, of Gloucester, &c. Others are named after their subject, as, *e. g.*, the statute *prærogativa regis*; and others again are distinguished by their initial words, as the statute of *Quia emptores*. But the most usual method has been to cite them by the year of the reigning sovereign and the chapter, as, 9 Geo. 2, c. 4,—all the Acts of *one session* of parliament taken together making properly

but *one statute*, so that when two sessions are held in one year, we usually say stat. 1 or 2, the Bill of Rights, *e. g.*, being cited as 1 W. & M. st. 2, c. 2; and it is now usual to insert in the Act a name referring to its subject-matter and date by which it shall be sufficient to cite it, *e. g.*, "The Public Health Act, 1875,"—a method of citation which has been recognised by the Interpretation Act, 1889 (52 & 53 Vict. c. 63), and also largely extended retrospectively by the Short Titles Act, 1892 (55 & 56 Vict. c. 10). And observe that the *title* is no part of the Act. (Att.-Gen. v. Weymouth, Amb. 22; Jeffries v. Alexander, 8 H. of L. Cas. 603, n.)

(*e*) As to the law of public and private Acts, see Lord Cromwell's case, 4 Rep. 13 a; Holland's case, ib. 76 a; Kirk v. Nowill, 1 T. R. 125; Samuel v. Evans, 2 T. R. 569. Thus, too, the Roman lawyers distinguished between the *senatûs consulta*, which regarded the whole community, and the *senatûs decreta*, which operated only upon particular persons and private concerns (Gravin. Orig. 1, § 24).

act (*f*); it being a rule prescribed to spiritual persons in general: but an act to enable the Bishop of Chester to make a lease to A. B. for sixty years concerns only the parties and the bishop's successors, and is therefore a private act. Again, of private acts, some are *local*, as affecting particular places only; others *personal*, as confined to particular persons (*g*). Of the first kind, an inclosure act is an example; of the second, an act for a change of name (*h*). With respect to the distinction between public and private statutes, it is to be observed that the courts are bound to take notice judicially of the former, but they were not bound to take judicial notice of the latter; however, by 13 & 14 Vict. c. 21, every statute made after the year 1850 was to be taken to be a public one, and judicially noticed as such, unless the contrary was therein expressly declared (*i*); and that statute has now been repealed by the Interpretation Act, 1889 (*k*), and in lieu thereof it has been now provided that every act passed or to be passed after the year 1850 shall be a public act and shall be judicially noticed as such, unless the contrary is expressly provided by the act (*l*).

Statutes also are sometimes described as *declaratory*, or *penal*, or *remedial*, according to the different nature of their objects or provisions. Declaratory statutes are where the old custom of the kingdom is almost fallen into disuse, or become disputable; in which case the parliament has thought proper, *in perpetuum rei testimonium*, and for

(*f*) Holland's case, 4 Rep. 76 a.

(*g*) In our printed statute book some Acts are described as being "public Acts of a local character." Some *private* Acts are not printed at all. (See 5 & 6 Vict. c. 97, s. 5; Barnett v. Cox, 9 Q. B. 617.)

(*h*) We find also in our books some Acts termed *general* and others *particular*; as to which it may be observed, that one of the latter class

is not repealed by a general statute later in date, unless by express reference or by necessary construction. (Thorpe v. Adams, Law Rep., 6 C. P. 125; Clements v. Ward, 35 Ch. Div. 589.)

(*i*) Known as "Lord Brougham's Act;" see Chorlton v. Lings, Law Rep., 4 C. P. 374.

(*k*) 52 & 53 Vict. c. 63.

(*l*) Ibid., s. 9.

avoiding all doubts and difficulties, to declare what the common law is and ever hath been. Thus, the statute of treasons, 25 Edw. III. st. 5, c. 2, did not make any new species of treasons; but only, for the benefit of the subject, declared and enumerated those several kinds of offence, which before were treason at the common law. Penal acts are those which impose penalties or punishments for an offence committed, as in the case of the statutes relative to game. Remedial acts are such as supply some defect in the existing law, and redress some abuse or inconvenience with which it is found to be attended, without introducing any provision of a penal character;—as in the case of the statute 3 & 4 Will. IV. c. 105, which introduced various improvements in the law relating to dower. But it is not every statute that falls within one or other of these divisions; for some combine more than one of these objects, and others have objects of a different description. There is also a distinction between acts of parliament, as being either *enlarging* or *restraining*, *enabling* or *disabling* acts. Thus the 32 Hen. VIII. c. 28, which gave bishops and other sole ecclesiastical corporations (except parsons and vicars) a more ample power of making leases than they possessed before, is called an enabling statute: and the 13 Eliz. c. 10, above noticed, which afterwards imposed certain limitations as to the making of leases by ecclesiastical persons, is described as a restraining or disabling statute (*m*).

Secondly, as to their interpretation. In interpreting statutes,—as well as in declaring the rule of the common law (*n*),—the courts are governed by former adjudications (*o*); or, in the absence of these, by general reasoning (*p*). But many specific rules are also laid down for their guidance; and principally these which follow:—

1. A statute begins to operate from the time when it

(*m*) Co. Litt. 44 b; 1 Bl. Com. 87.

(*n*) Vide sup. p. 53.

(*o*) By Lord Kenyon, *Lacon v.*

Hooper, 6 T. R. 224; and see *Rex v. Leek Wootton*, 16 East, 122.

(*p*) Hob. 346.

receives the royal assent, unless some other time be fixed by the act itself for the purpose (*q*). The rule on this subject was formerly different; for at common law every act of parliament, which had no provision to the contrary, was considered, as soon as it passed, (that is, received the royal assent,) as having been in force retrospectively from the first day of the session of parliament in which it passed, though in fact it might not have received the royal assent, or even been introduced into parliament, until long after that day. Thus where a statute provided that every deed of annuity granted *after the passing of the act* should be enrolled within twenty days after execution, and the act received the royal assent in May, 1777, but the session had commenced in October, 1776, an annuity deed, executed in January, 1777, nearly four months before the royal assent was given, but after the commencement of the session, was adjudged to be void for non-compliance with the provision (*r*). This strange principle, however, though rigidly observed for centuries, no longer prevails; it being expressly provided by 33 Geo. III. c. 13, that where no other direction is given, every act shall be considered as commencing from the date indorsed upon it as the date of its receiving the royal assent—a manifest improvement, it must be owned, on the former law (*s*); though

(*q*) 33 Geo. 3, c. 13; Nares *v.* Rowles, 14 East, 510; Tomlinson *v.* Bullock, 4 Q. B. D. 230. But by 48 Geo. 3, c. 106, where an Act expired before a bill for continuing it, introduced in the same session, received the royal assent, the latter Act took effect (unless otherwise provided, and except as to penalties,) from the expiration of the former; and it has now been provided by the Interpretation Act, 1889 (52 & 53 Vict. c. 63), that as regards all Acts passed or to be passed after the year 1850, repealing wholly or partially any

former enactment, and substituting provisions for those of the repealed enactment, the repealed enactment shall remain in force until the substituted provisions come into operation. (Sect. 11.) Of late years it has been usual to pass an Act in each session, continuing for a fixed period certain Acts then about to expire. 57 & 58 Vict. c. 48 (1894) is an example of such a statute.

(*r*) Latless *v.* Holmes, 4 T. R. 660.

(*s*) See also 52 & 53 Vict. c. 63 (The Interpretation Act, 1889), ss. 36, 37.

it has been doubted (and with reason) whether even the new rule is placed upon the right basis, and whether some fixed and reasonable period ought not always to be interposed between the passing of an act and the time of its coming into operation, so as to give the subjects of the realm an opportunity of becoming acquainted with its provisions (*t*). The rule, it will be observed, is laid down with an exception of the case where the period of commencement is otherwise fixed by the statute itself; for by force of an express provision, or even by necessary construction from the nature of the enactment, the operation of a statute may be either postponed on the one hand, or have a retrospective relation on the other, so as to affect rights which had vested before it received the royal assent, or transactions which had before then taken place (*u*).

2. Statutes are to be construed not according to their mere letter, but according to the intent and object with which they were made (*x*). It occasionally happens therefore that the judges who expound them are obliged, in favour of the intention, to depart in some measure from the words. And this may be either by holding that a case apparently within the words, is not within the meaning; or that a case apparently not within the words, is within the meaning. Thus where a statute provides that all who shall commit a certain act shall be deemed felons, yet a madman who does the act shall not be deemed a felon; for that would be contrary to the presumable intention (*y*). And so, on the other hand, where an act of parliament gave the owners of inheritances a remedy by action against such tenants holding for life or *years* as should commit waste (i. e. spoil and destruction); the action was

(*t*) See Kent's Comm. Lect. 20; Dwaris on Stats. 683.

(*u*) Upon the subject of construing a statute retrospectively, see Burn v. Carvalho, 1 Ad. & El. 338; Hitchcock v. Way, 6 Ad. & El.

943; Moon v. Durden, 2 Exch. 22; Wright v. Hale, 6 H. & N. 229.

(*x*) Bac. Ab. Statute (1), 5; Stradling v. Morgan, Plow. 205; Rex v. Everdon, 9 East, 101.

(*y*) Eyston v. Studd, Plow. 465.

held maintainable against a tenant holding only for one year or less, for so the law-makers presumably designed (z). In all instances, where the strict letter of the law is thus corrected by reference to its intention, the construction is said to proceed upon the *equity* of the statute (a), a phrase not peculiar to the law of England, but used by foreign jurists in the same sense (b). Thus, in the first example, the case would be said to be out of the equity of the act; in the second, to be within its equity (c). It is to be observed, however, that this principle of equitable construction is not to be carried beyond certain bounds, and a judge is not at liberty, in favour of a supposed intention, to disregard the express letter of the statute, where, for any thing that appears, the wording may correspond with the actual design of the legislature—the maxim in cases of this description being that *a verbis legis non recedendum est* (d). It is also important to remark, that the rule in question has been applied more freely to the antient statutes than it has been to those of more modern date, which latter are interpreted somewhat more strictly, and with closer adherence to the letter (e). For the style of framing acts of parliament has itself undergone a material change—those of a more antient era being comparatively short and general in their character, while the later acts are expanded into minute detail, and intended to reach every specific case; and there is therefore now little, if any, room for the interpretation according to the equity of the statute; and in fact such

(z) Plow. 467.

(a) Ibid.; Co. Litt. 24 b. The term is of very early occurrence in our law (see Bract. lib. 1, c. 4, p. 3 a; lib. 2, c. 7, p. 23 b).

(b) Grotius de *Æquitate*, s. 3; Puffendorf, *Elem. Jur. Un.* lib. 1, ss. 22, 23.

(c) 3 Bl. Com. 431.

(d) Edrich's case, 5 Rep. 118 b; and see *Jones v. Smart*, 1 T. R. 52;

and *R. v. Inhabitants of Great Bentley*, 10 Barn. & Cress. 520.

(e) Per Coleridge, J., *Rex v. Gardner*, 6 Ad. & El. 118; and see *Brandling v. Barrington*, 6 Barn. & Cress. 475; *Rex v. Inhabitants of Barham*, 8 Barn. & Cress. 104; *Notley v. Buck*, ib. 164; *Adam v. Inhabitants of Bristol*, 2 Ad. & El. 395, 399.

interpretation, as regards modern statutes, has been almost wholly discredited; and the words themselves of the statute are now taken to express its real intention (*f*).

3. Another maxim (and one that may often serve for our guidance in the application of the last), is, that in the interpretation of statutes in general, the following points are to be considered,—the old law, the mischief, and the remedy; that is, how the common law stood at the making of the act, what the mischief was for which the common law did not provide, and what remedy the parliament hath provided to cure this mischief (*g*). And here an example may be found in the restraining statute of 13 Eliz. c. 10, to which we have already adverted (*h*). By the common law the master and fellows of a college, and other such corporations, might let as long leases as they thought proper; the mischief was that they let long and unreasonable leases, to the impoverishment of their successors; the remedy applied by the statute was by making void all leases made by them for longer terms than three lives, or twenty-one years. Now in the construction of this statute it was held, that leases, though for a longer term, made by the master and fellows of a college or a dean and chapter, are not void during the time of the master or the dean; for the act was made for the benefit and protection of the successor (*i*), and the mischief is therefore sufficiently suppressed by vacating them after the determination of the interest of the grantors; but the leases, during the con-

(*f*) Since the Interpretation Act, 1889 (52 & 53 Vict. c. 63), there is less reason than ever for having recourse to the doctrine of the equity of the statute; for by that Act the shorter expressions that are popularly used have received in numerous cases their full legal significance.

(*g*) Heydon's case, 3 Rep. 7; 1

Bl. Com. 87; 2 Inst. 110; Salmon *v. Duncombe*, 11 Ap. Ca. 627.

(*h*) Vide sup. p. 67.

(*i*) Co. Litt. 45, n. (4), by Harg.; Bac. Ab. Leases (H.); Magdalen College case, 11 Rep. 73 a. And see Magdalen Hospital (Governors) *v. Knotts*, 5 Ch. Div. 175; on appeal, 8 Ch. Div. 709, and 4 App. Ca. 324.

tinuance of the interest of the grantors, not being within the mischief, are not within the remedy (*k*).

4. It is also an established rule, that remedial statutes are to be more liberally, and penal statutes more strictly, construed (*l*). The statute of Elizabeth just mentioned may again serve as an example; for, soon after it was made, the master and fellows of Magdalen College granted certain premises to the queen, her heirs, and successors, on condition that she should convey the same to a certain person named: and it was contended that this conveyance was not restrained by the act; for that, by the general rule of law, the sovereign is not bound by a statute unless specially mentioned; which the court admitted to be in many cases true. But as this was a remedial act, it was adjudged that it should bind the queen (*m*). As to the stricter manner in which a penal act must be interpreted, we may resort to an illustration of Lord Bacon's, that if for a certain offence it be enacted that a man shall lose his right hand, and some offender hath had his right hand before cut off in the wars; he shall not lose his left hand, but the crime shall rather pass without the punishment which the law assigned, than the letter of the law shall be extended (*n*); and this distinction applies not only to remedial and penal statutes properly so called, but also to those of a mixed kind, which contain both remedial and penal provisions (*o*).

5. In the construction of a statute, all other such statutes ought to be taken into consideration as have been made *in pari materiâ*; and this rule applies whether the prior acts are referred to in the statute on which the question arises, or not; for they are considered as all forming one continued enactment (*p*). Moreover, the *fasciculus* of

(*k*) 1 Bl. Com. 87.

ss. ^ Ibid. 88.

(*c*) Magdalen College case, 11

(*d*) E.

and see J. Maxims, 12.

(*o*) See *Platt v. Sheriffs of London*, Plowd. 36; *Bones v. Booth*, W. B. 1236.

(*p*) Bac. Abr. Statute (1), 2, 3; *Jones v. Smart*, 1 T. R. 53; *King*,

connected statutes is subject to all the like rules of construction that are applicable to the construction of deeds and ordinary written contracts, *e. g.*, such rules as have reference to controlling, in certain cases, the enacting (or operative) part by means of the preamble (or recitals) (*q*), and the rules for interpreting particular clauses in the document by reference to the context (*r*), and other like rules. And as regards private acts of parliament, although the private act is obtained by an individual or individuals for his or their own individual advantage, while a public act is obtained by the public, and presumably therefore for the public advantage; still, if the words of the private act are in themselves perfectly clear, there is no difference between the rules for their construction—the construction of each kind of act being (it has been said) matter for the strictest criticism, but once that construction is arrived at, the consequences being precisely the same in the case of each (*s*). And it is upon the same principles of construction, that the marginal notes annexed to the sections of an act (*t*), and the sub-headings under which sections are sometimes grouped together (*u*), may be fairly considered in arriving at the true construction of the act.

6. A statute, which treats of things or persons of an inferior rank, cannot by any general words be extended to those of a superior; and therefore, inasmuch as the statute 13 Eliz. c. 10, before referred to, applied its prohibition to “masters and fellows of colleges, deans

qui tam, *v. Smith*, 4 T. R. 419; 196.

Duck v. Addington, 4 T. R. 447;

Gale v. Laurie, 5 Barn. & Cress.

156; *Earl of Aylesbury v. Pattinson*, 1 Doug. 30.

(*q*) *Danby v. Coutts*, 29 Ch. D. 500.

(*r*) *Bentley v. Rotherham Board of Health*, 4 Ch. D. 588, per *Jessel*, M. R., at pp. 592, 593; and see also *Rex v. Pierce*, 3 M. & S. 62; and *Salkeld v. Johnson*, 1 Hare,

196.

(*s*) *Altrincham Union v. Cheshire Lines Committee*, 15 Q. B. D. 597, per Lord Esher, M. R., at pp. 602, 603.

(*t*) *Venour v. Sellon*, 2 Ch. D. 525; *Sutton v. Sutton*, 22 Ch. D. 511.

(*u*) *Hammersmith Rail. Co. v. Brand*, L. R. 4 H. L. 171; and *Union Steamship Co. v. Melbourne Harbour*, 9 App. Ca. 365.

and chapters of cathedrals, masters of hospitals, parsons and vicars, or any other having any spiritual or ecclesiastical living," a *bishop* was held not to be included within its provisions; for, though he has a spiritual living, he is of higher dignity than any of the persons enumerated (*x*).

7. Where the provision of a statute is general, every thing necessary to make that provision effectual is supplied by the common law; and therefore, when anything is commanded or prohibited by an act of parliament, and no remedy for the breach is thereby expressly given, any party, who sustains a private injury from the breach, is entitled to bring his action for relief; and if the matter be of public concern, the offender shall besides be considered as guilty of a misdemeanor, and liable to indictment accordingly (*y*). The law in this case will be the same, even though the statute after the prohibition, proceeds by a separate clause to annex a particular pecuniary penalty to the offence if committed; for that will not take away the other remedies (*z*); but where a statute merely inflicts a pecuniary penalty for an act not previously unlawful, and contains no direct prohibitory clause, the only remedy is to proceed for the penalty (*a*).

8. A subsequent statute may repeal a prior one, not only by express provision to that effect, but by necessary

(*x*) 1 Bla. Com. 88; Archbishop of Canterbury's case, 2 Rep. 46 b; 2 Hawk. c. 27, s. 124.

(*y*) Bac. Abr. Statute (B); 2 Inst. 131, 163. See the case of the Marshalsea, 10 Rep. 75 b; 2 Hale, P. C. 171; Rex v. Harris, 4 T. R. 205; Rex v. Leginham, 1 Mod. 71; Carden v. General Cemetery Company, 5 Bing. N. C. 253; R. v. Badger, 12 L. J., Q. B., N. S. 227.

(*z*) Per Ashurst, J., Rex v. Harris, 4 T. R. 205; Beckford v. Hood, 7 T. R. 620; Rex v. Wright,

1 Burr. 543; and see especially Cooper v. Whittingham, 15 Ch. D. 501; Tottenham Local Board v. Rowell, 15 Ch. D. 378; and consider Powell v. Fall, 5 Q. B. D. 597.

(*a*) See Rex v. Buck, 2 Str. 679; Rex v. Wright, *ubi sup.*; Rex v. Robinson, 2 Burr. 805; and consider Couch v. Steel, 3 E. & B. 402; Atkinson v. Newcastle, &c. Co., 2 Exch. Div. 441; and Ward v. Hobbs, 4 App. Ca. 13.

implication; and every statute is a repeal by implication of a preceding statute, so far as it is contrary thereto, for *leges posteriores priores abrogant* (b); consonant to which it was laid down by a law of the Twelve Tables at Rome, that *quod populus postremum jussit id jus ratum esto*. But this is to be understood only when the matter of the later statute is so clearly repugnant that it necessarily implies a negative. As if a former act says, that a juror shall have an estate of twenty pounds a year; and a new statute afterwards enacts, that he shall have twenty marks:—here the latter statute virtually repeals the former. For if twenty marks be made qualification sufficient, the former statute which requires twenty pounds is at an end (c). But if the enactments are such that they may stand together, here the latter does not repeal the former, but they shall both have a concurrent efficacy. As if by a former law an offence be indictable at the quarter sessions, and a later law makes the same offence indictable at the assizes;—here the jurisdiction of the sessions is not taken away, but both have concurrent jurisdiction, unless the new statute subjoins express negative words, as, that the offence shall be indictable at the assizes, *and not elsewhere* (d).

9. It was formerly the rule, that if a statute, repealing another, was itself repealed afterwards, the first statute was revived, without any formal words for that purpose (e). Thus when the statute of 5 & 6 Edw. VI. c. 12, providing that the matrimony of priests should be deemed true and lawful matrimony to all purposes, was repealed by a

(b) Bac. Abr. Statute (D). See *Paget v. Foley*, 2 Bing. N. C. 679; *Daw v. The Metropolitan Board of Works*, 12 C. B., N. S. 161; *Garnett v. Bradley*, 3 App. Ca. 944.

(c) Jenk. Cent. 2, 73.

(d) *Dr. Foster's case*, 11 Rep. 63; and see the *Conservators of the Thames v. Ball*, Law Rep., 1 C. P.

415; *Fitzgerald v. Champneys*, 2 J. & H. 31; and *Clements v. Ward*, 35 Ch. Div. 589.

(e) See *The Bishops' case*, 12 Rep. 7; 4 Inst. 325; *Tattle v. Grimwood*, 3 Bing. 493; *Doe v. Gully*, 9 Barn. & Cress. 344; *Phillips v. Hopwood*, 10 Barn. & Cress. 39.

statute 1 Mary, st. 2, c. 2, and this latter statute was afterwards repealed by the act of 1 Jac. I. c. 25; it was held that there needed not any express words of revival in King James's statute (though such words are in fact contained therein), but that the act of Edward the sixth was impliedly and virtually revived (*f*). But the rule in this respect was altered by the 13 & 14 Vict. c. 21, which enacted that where any act repealing in whole or in part any former statute was itself repealed, such last repeal should not revive the act or provisions before repealed, unless words were added for that purpose; and that where any act was made repealing in whole or in part any former act, and substituting provisions instead of those repealed, such repealed provisions should remain in force till those substituted should come into operation by force of the last made statute; and although the 13 & 14 Vict. c. 21 has been repealed by the Interpretation Act, 1889 (*g*), the provisions of the repealed act in all these respects are re-enacted in the repealing act (*h*).

10. [Acts of parliament derogatory from the power of subsequent parliaments bind not. Accordingly the statute 11 Hen. VII. c. 1, which directed that no person for assisting a king *de facto* should be attainted of treason by act of parliament or otherwise, was held to be good only as to common prosecutions for high treason, but not to restrain or clog any parliamentary attainder (*i*). And this because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority; it acknowledges no superior upon earth, which the prior legislature must have been, if its ordinances could bind a subsequent parliament. And upon the same principle Cicero, in his letters to Atticus, treats with a proper contempt these restraining clauses, which endeavour to tie up the hands of succeeding legislatures. "When you repeal the law

(*f*) The Bishops' case, 12 Rep. 7.

(*g*) 52 & 53 Vict. c. 63.

(*h*) Ibid., sect. 11.

(*i*) 4 Inst. 43.

[“itself,” says he, “you at the same time repeal the prohibitory clause, which guards against such repeal” (k).]

These are the several grounds of the law of England in its proper and original extent. There is a species, however, of unwritten law to which no reference has yet been made, but which has long formed part of the general system, and (though here noticed in the last place) constitutes one of its principal divisions (l). This is *equity*; which is so termed by way of distinction from the original and proper law of England, or (as it is usually called in this case) the *common law*. For that phrase (we are to observe) is used in two senses,—either, firstly, as denoting legal institutions which have their existence by custom only, and not by statute; or, secondly, as expressing legal institutions as distinguished from the institutions which have arisen in a court of equity alone; however, in both its senses the term serves to indicate that which is more antient, as opposed to that which is less so; the statute law being of modern creation when compared with that which is of immemorial antiquity; and equity being of considerably later birth than some of the earlier parts of the common law. The origin of equity may be stated as follows. The antient structure of our national jurisprudence (whatever might be its merit in other particulars) was singularly defective in compass and enlargement of view. It took no account of several subjects for which it is the duty of a civilized judicature to provide; and to others, it applied maxims too strict and unbending to satisfy the notions of justice in an advanced state of society. Its judicial remedies were also in some cases of a cumbrous and inconvenient or limited character. For these evils the progressive introduction of new remedial laws, by act of the legislature, would seem to have been the natural remedy. But the course of things was different. Owing perhaps to

(k) “*Cum lex abrogatur, illud ipsum abrogatur, quo non eam abrogari oporteat.*”—Ep. ad. Att. iii. 23.

(l) Vide sup. p. 42 et seq.

some peculiar averseness in the early genius of the country from change in its legal institutions, the law administered between subject and subject, in the antient courts of the realm, was allowed to remain for a long period of our history with very little alteration of a fundamental kind. But new courts were on the other hand gradually established with a collateral, and in some sense, an usurped jurisdiction, in which cognizance was taken of those subjects which the common law of England had overlooked or insufficiently regulated; relief was given from the consequences of some of the harsher doctrines of the common law; and the defects of its judicial methods were in certain cases supplied. These new courts had been, at the outset, chiefly resorted to for one particular purpose, viz., the mitigation of what was felt to be the severity of the common law in the particular case; but before long the whole system of rules and principles therein administered, and which, without much propriety, obtained, by reference to the liberal principle of interpreting positive laws (*m*), the appellation of *equity*, began to hold, and afterwards successfully maintained, a divided empire with the more antient, or common law. Thus it happened that in the chief of these tribunals—viz., the High Court of Chancery—a very large proportion of the whole forensic business of the country, (that is, in matters of property, for beyond this that court never assumed jurisdiction,) came to be administered; and the extensive subjects, in particular, of *trusts* and *partnerships*, fell almost exclusively under its management. That court was also the proper and regular tribunal to which recourse was had, when the object was either to compel a man to specifically perform a contract into which he had entered, or to cause him to abstain from the commission of some specific injury,—the common law courts interfering in general only so far as to award *damages* where the breach of contract or the wrong had been already com-

(*m*) Mitford, Plead. in Chan. p. 3.

mitted; and although their jurisdiction in this respect had been somewhat enlarged by the Common Law Procedure Act, 1854 (*n*), still it was not until the Judicature Acts, 1873 and 1875, that the two systems of law and equity came to be administered in the appropriate divisions of a single tribunal, constituted out of the superior courts of justice existing at the date of these acts, and styled Her Majesty's Supreme Court of Judicature (*o*); and by the Judicature Act, 1873, it was provided that in all matters in which there was any conflict or variance between the rules of equity and the rules of the common law, with reference to the same matter, the rules of equity should prevail, *scil.*, as regards principles and substantive law (*p*); for in matters of practice or procedure, when the Orders and Rules of 1883 are silent, the court is in the habit of adopting (in case of any conflict between law and equity) that procedure which is the more convenient of the two (*q*), all which will in due course hereafter more fully appear.

(*n*) 17 & 18 Vict. c. 125. See Benson *v.* Paull, 6 Ell. & Bl. 373; Norris *v.* Irish Land Company, 8 Ell. & Bl. 526.

(*p*) 36 & 37 Vict. c. 66, s. 25 (11).
(*q*) Thomas *v.* Palin, 21 Ch. D. 360; Jackson *v.* Litchfield, 8 Q. B. D. 474.

(*o*) Vide post, bk. v. c. v.

SECTION IV.

OF THE COUNTRIES SUBJECT TO THE LAWS OF ENGLAND.



By the common law, the municipal law of England does not extend to any place out of England, and therefore did not extend to Wales, Scotland, Ireland, Berwick-upon-Tweed, or any other part of the dominions of the Crown excepting England; nevertheless, by force of the statute law (*a*) the laws of England, or some of them, do now obtain, more or less, in all of these places (*b*);—of each of which it will be proper first to take a review, before we consider the Kingdom of England itself, the original and proper subject of these laws.

[And, first, of Wales :—For many centuries after its invasion by the Romans, Wales remained independent of England, and in the primitive pastoral state which Cæsar and Tacitus ascribe to Britain in general (*c*); and in the time of the Saxons, the antient inhabitants of the island retired to its natural intrenchments, for protection against their hostile visitants. But when these invaders themselves, who in the meantime had been converted to Christianity, settled down under regular governments, they gradually drove the antient Britons into a narrower

(*a*) 1 Bl. Com. p. 93.

(*b*) It may be here remarked that such statutes as apply exclusively to Scotland, Ireland, or the Colonies, are not, as a general rule, noticed in this work, which pro-

fesses only to treat of the laws of *England*.

(*c*) As to Wales, see Vaugh. 395—420; Rex *v.* Cowle, 2 Burr. 850; 2 Inst. 195; 4 Inst. 239; Buckley *v.* Thomas, Plowd. 121, 123, 126, 129.

[territory, pursuing them from one fastness to another, and eventually after repeated losses abridging them of their wild independence. Very early in our history, we find their princes doing homage to the crown of England; till at length in the reign of Edward the first, who may justly be styled the conqueror of Wales, the line of their antient princes was abolished (*d*), and the king of England's eldest son was created their titular prince (*e*); the territory of Wales being then entirely re-annexed, by a kind of feodal resumption, to the dominion of the crown of England (*f*); or, as the statute of Wales (12 Edw. I.) expresses it, "*terra Walliæ cum incolis suis, prius regi jure feodali subjecta, jam in proprietatis dominium totaliter et cum integritate conversa est, et coronæ regni Angliæ tanquam pars corporis ejusdem annexa et unita*" (*g*). By this statute of Wales, very material alterations were also made in divers parts of the laws of Wales so as to reduce them nearer to the English standard, especially in the forms of their judicial proceedings; but they still retained very much of their original jurisprudence, particularly their rule of inheritance, by which their lands were divided equally among all the issue male, and did not descend to the eldest son alone. However, by other subsequent statutes, their provincial immunities were still farther abridged: and the finishing stroke to their independence was given by the statute 27 Hen. VIII. c. 26 (as confirmed and enlarged by the statute 34 & 35 Hen. VIII. c. 26). These statutes of Hen. VIII. gave at the same time the utmost advancement to the civil prosperity of the people of Wales, by admitting them to a thorough communication of laws with the people of England,] and by

(*d*) See Turner's Hist. Eng. p. 3, c. ii; Hume's Hist. Eng. c. xiii.

(*e*) Blackstone says he became "their titular prince as a matter of course;" but the expression is not accurate; as the title of Prince of

Wales is always conferred on the heir apparent by special creation and investiture.

(*f*) Vaugh. 400; Rex *v.* Cowle, 2 Burr. 851.

(*g*) 12 Edw. 1.

enacting (amongst other matters of less importance),—
 1. That the dominion of Wales shall be for ever united to the kingdom of England; 2. That all Welshmen born shall have the same liberties as other the king's subjects; 3. That lands in Wales shall be inheritable according to the English tenures and rules of descent; 4. That the laws of England, and no other, shall be used in Wales; and 5. That Wales shall be divided into twelve counties or shires, exclusive of the county of Monmouth, which is made one of the counties of England.

[From the time of Hen. VIII., therefore, the civil condition of the principality has differed but slightly from that of England: and it may be remarked, that an Act of Parliament, where England only is mentioned, now includes Wales also (*h*). Wales, however, for a long time possessed within itself superior courts called Courts of Great Session, independent of the process at Westminster Hall, and was not visited by the English judges of assize (*i*): also, such of its counties and towns as were represented in parliament sent each one member only, while the usual number in England was two.] But, in 1831, by 11 Geo. IV. & 1 Will. IV. c. 70, the jurisdiction of these Courts of Great Session was abolished; and it was by the same statute enacted, that assizes should be held in Wales for the trial of all matters civil and criminal, in like manner and form as had been usual for the counties in England. And by the Reform Act of the succeeding year (2 & 3 Will. IV. c. 45), a new arrangement was made as to the return of members of parliament for Wales; by the effect of which, three of its counties used thereafter respectively to send two knights of the shire to parliament, and each of the remaining counties one. And

(*h*) See 20 Geo. 2, c. 42, s. 3. So also by 8 & 9 Vict. c. 11, the manner of assigning *sheriffs* of counties in Wales was regulated and

assimilated to that in England.

(*i*) The proceedings in the Courts of Great Session of Wales were partly regulated by 13 Geo. 3, c. 51.

under the Representation of the People Act, 1884 (*j*), and the Redistribution of Seats Act, 1885 (*k*), Wales is now placed upon a similar footing to England as regards representation in parliament (*l*).

[Secondly, as regards Scotland :—The kingdom of *Scotland*—notwithstanding the union of the crowns on the accession of James the sixth of Scotland and first of England—continued an entirely separate and distinct kingdom for above a century more, though an union had been long projected ; which union was judged to be the more easy to be effected, as these kingdoms exhibited at the time of the project a very great resemblance, though far from identity, in their institutions. And this is remarked by Sir Edward Coke (*m*), who points out a conformity, in many things, not only in the religion and language of the two nations, but also in their antient laws (*n*). As to the latter particular, indeed, this resemblance did not exist at the time of the Norman conquest, for the Scottish institutions were then, according to the best authorities, exclusively Celtic, and those of England, Anglo-Saxon (*o*) : but it had become established as soon afterwards as the twelfth century (*p*) ; and not only continued to prevail at the

(*j*) 48 Vict. c. 3.

(*k*) 48 & 49 Vict. c. 23.

(*l*) See also 52 & 53 Vict. c. 40, providing for the extension of a higher class of education in Wales, as more fully noted in vol. III. c. IV., on Education.

(*m*) 4 Inst. 345.

(*n*) Blackstone says that both kingdoms “were antiently under the same government,” and cites 1 Jac. 1, c. 1, as declaring that “these two mighty, famous, and antient kingdoms were formerly one.”

(*o*) See Hallam’s Constitutional Hist. vol. iii. p. 404, 3rd ed.

(*p*) The most antient book of Scottish law, called *Regiam Majestatem* (the authenticity of which, though once a subject of dispute, seems on the whole to be sufficiently established,) is so similar to the treatise of Glanvil on English law in the reign of Hen. 2, that one of them is plainly copied from the other. There seems little reason, however, to doubt that Glanvil’s is the original work. As to these treatises, see Inst. ubi sup. ; Erskine’s Instit. b. 1, t. 1, s. 32 ; Robertson’s Chas. V. vol. i. n. (25) ; Hist. Eng. Law, by Reeves, vol. i. p. 225.

[time of the Union, but is even yet in some particulars distinctly perceptible. The diversities of practice, however, in two large and independent jurisdictions, and the acts of two distinct parliaments, in process of time naturally introduced great diversities: and to the antient alliance and connection of Scotland with France, where the civil law chiefly prevailed, must be attributed this further diversity in Scotch law, compared with the law of England, namely, that the Scotch law, particularly in all that regards contracts and commerce, presents an extraordinary and indeed predominant conformity with the Roman law, excepting where modern legislation and English influences have concurred in modifying it (*q*).

All difficulties in the way of the union of the two kingdoms, whether arising from their diversities of law or from other occasions, were in due course overcome, and the union was effected in the year 1706, during the reign of Queen Anne, by a statute commonly called the Act of Union (*r*), by which twenty-five articles were agreed to by the parliaments of both nations, and the most considerable of which were as follows:—

1. On the first of May, 1707, and for ever after, the kingdoms of England and Scotland shall be united into one kingdom, by the name of Great Britain (*s*);

2. The succession to the monarchy of Great Britain shall be the same as was before settled with regard to that of England;

3. The united kingdom shall be represented by one parliament (*t*);

(*q*) See Erskine's Instit. b. 1, t. 1, s. 41. By 19 & 20 Vict. c. 60, the laws of England and Scotland were assimilated on several miscellaneous points affecting trade and commerce.

(*r*) See the Act of Union (6 Ann. c. 11, sometimes printed 5 & 6 Ann. c. 8).

(*s*) We may here remark that by

4 & 5 Vict. c. 30, and 33 & 34 Vict. c. 13, an ordinance *survey* of Great Britain, and by 8 & 9 Vict. c. 63, and 14 & 15 Vict. c. 42, a geological survey of the United Kingdom, were authorized to be taken.

(*t*) There is an appellate jurisdiction in the House of Lords over the Scotch Courts in civil cases, as to which see 6 Ann. c. 53; 48

[4. There shall be a communication of all rights and privileges between the subjects of both kingdoms, except where it is otherwise agreed ;

9. When England raises 2,000,000*l.* by a land tax, Scotland shall raise 48,000*l.* ;

16, 17. The standards of the coin, and of weights and measures, shall be reduced to those of England, throughout the united kingdom (*u*) ;

18. The laws relating to trade, customs, and the excise, shall be the same in Scotland as in England (*v*), all the other laws of Scotland, nevertheless, remaining in force, though alterable by the parliament of Great Britain,—such of these laws as relate to public policy being alterable at the discretion of such parliament, and such of them as relate to private rights not being alterable save for the evident utility of the people of Scotland ;]

22. Sixteen peers were to be chosen to represent the peerage of Scotland in parliament (*w*), and forty-five members to sit in the house of commons ; which number of commoners was, however, afterwards raised to sixty (*x*), and has now been raised to seventy-two (*y*) ; and

23. [The sixteen representative peers of Scotland shall have all privileges of parliament : and all peers of Scotland shall be peers of Great Britain, and rank next after those of the same degree at the time of the union ; and shall have all privileges of peers, except sitting in the house of lords and voting on the trial of a peer (*z*).

Geo. 3, c. 151 ; and 39 & 40 Vict. c. 59, s. 3. But as to the court of *Justiciary*, see *Mackintosh v. The Lord Advocate*, 2 App. Ca. 41.

(*u*) Art. 17 of the Act of Union was repealed by 41 & 42 Vict. c. 49.

(*v*) See *Maxwell v. Mayre*, 1 Bla. Rep. 271, 364.

(*w*) 6 Ann. c. 78. And see 2 & 3 Will. 4, c. 63 ; 10 & 11 Vict. c. 52 ;

14 & 15 Vict. c. 87.

(*x*) See 2 & 3 Will. 4, c. 65, and 31 & 32 Vict. c. 48, Acts passed in the years 1832 and 1868 respectively to amend the representation of the people in Scotland.

(*y*) 48 & 49 Vict. c. 23. See also 48 Vict. c. 3.

(*z*) See *Lord Mornington's case*, Fort. Rep. 165 ; *Duke of Queensberry's case*, 1 Peere Wms. 582.

[These are the principal of the twenty-five articles of union, which are ratified and confirmed by the Act of Union, 6 Anne, c. 11: in which statute there are also two acts of parliament recited, namely, one of Scotland (*a*), whereby the church of Scotland, and also the four universities of that kingdom, are established for ever, and all succeeding sovereigns are to take an oath inviolably to maintain the same; and the other of England (*b*), whereby the Acts of Uniformity of the thirteenth year of Elizabeth and the thirteenth and fourteenth years of Charles the second (except as the same had been altered by parliament at that time), and all other acts then in force for the preservation of the church of England, are declared perpetual; and it is stipulated that every subsequent king and queen shall take an oath inviolably to maintain the same within England, Ireland, Wales, and the town of Berwick-upon-Tweed. And the Act of Union expressly and particularly enacted that these two acts “shall for ever be observed as fundamental and essential conditions of the union.”

Upon these articles and Act of Union, it is to be observed (*c*)—1. That the two kingdoms are now so inseparably united, that nothing can ever disunite them again except the mutual consent of both, or the successful resistance of either, upon apprehending an infringement of those points which, when they were separate and independent nations, it was mutually stipulated should be “fundamental and essential conditions of the union.” 2. That whatever else

(*a*) 1 W. & M. c. 5 (an Act for securing the Protestant religion and Presbyterian church government).

(*b*) 5 Ann. c. 5 (an Act for securing the Church of England as by law established).

(*c*) It has not been thought convenient to modify the way in which Blackstone here expresses himself; but it will be noticed that some

alteration in the act of uniformity was effected by “The Universities Tests Act, 1871” (34 & 35 Vict. c. 26); and also that the liturgy of the church of England was changed in certain particulars by “The Prayer Book (Tables of Lessons) Act, 1871” (34 & 35 Vict. c. 37). See also the 22 Vict. c. 2, abolishing the church services for some particular days.

[may be deemed “fundamental and essential conditions,” the preservation of the two churches of England and Scotland in the same state that they were in at the time of the union, and the maintenance of the Acts of Uniformity which establish our common prayer, are expressly declared so to be. 3. That therefore any alteration in the constitution of either of those churches, or in the liturgy of the church of England, (unless with the consent of the respective churches, collectively or representatively given,) would be an infringement of these “fundamental and essential conditions.” 4. That the municipal laws of Scotland are ordained to be still observed in that part of the island, unless altered by parliament; and, as the parliament has not yet thought proper, except in certain instances, to alter them, they still (with regard to the particulars unaltered) continue in full force.] Wherefore the municipal laws of England are, generally speaking, of no force or validity in Scotland; nor, on the other hand, are those of Scotland of force or validity in England (*d*); and of consequence, in the ensuing Commentaries, we shall have very little occasion to mention, any further than sometimes by way of illustration, the municipal laws of the Scottish part of the united kingdom. It is however to be observed, that acts of parliament, passed since the union, extend in general to Scotland, though that country be not expressly mentioned. If it be intended to except Scotland, there must be an express proviso to that effect, or the intention of the legislature to except it must be otherwise sufficiently indicated (*e*). A separate secretary of state for Scotland has

(*d*) Our courts do not even take judicial notice of the state of the law in Scotland; but (as in the case of a foreign country) if any question upon it happens to arise, it is considered as a matter of fact to be ascertained by evidence. (See *Woodham v. Edwards*, 5 Ad. & El. 771; *Bradlaugh v. De Rin*, Law Rep., 5

C. P. 473.) Nevertheless, a great comity of legal intercourse prevails between Scotland and England, especially since the Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), and the Inferior Courts Judgments Extension Act, 1882 (45 & 46 Vict. c. 31).

(*e*) *Rex v. Cowle*, 2 Burr. 853;

been recently appointed (*f*), but this is only for the more convenient management of the business of the two countries, regarded as one united kingdom (*g*).

[Thirdly, as regards the town of *Berwick-upon-Tweed* :— This town was originally part of the kingdom of Scotland ; but it was for a time reduced by King Edward the first into the possession of the crown of England ; and, during such its subjection, it received from that prince a charter, which, (after its subsequent cession by Edward Balliol to be for ever united to the crown and realm of England,) was confirmed by King Edward the third, with some additions ; particularly that it should be governed by the laws and usages which it enjoyed during the time of King Alexander, that is, before its reduction by Edward the first. Its constitution was, however, remodelled and put upon an English footing by a charter of King James the first, and its liberties, franchises, and customs were confirmed in parliament by the statute 2 Jac. I. c. 28, apparently following an earlier statute 22 Edw. IV. c. 8 ; and although therefore it hath some local peculiarities, derived from the antient laws of Scotland, yet it is now clearly part of the realm of England, and is accordingly duly represented by burgesses in the House of Commons (*h*). Accordingly, by statute 20 Geo. II. c. 42, s. 3, where England only is mentioned in any act of parliament, the same notwithstanding comprehends and includes the town of Berwick-upon-Tweed. At the same time, Berwick is no part of the county of Northumberland (*i*), but forms,

e.g., the Local Government Act, 1888 (51 & 52 Vict. c. 41), does not extend to Scotland, but that country has its own special act, namely, the Local Government (Scotland) Act, 1889 (52 & 53 Vict. c. 50). See also the Scotch Universities Act, 1889 (52 & 53 Vict. c. 55).

(*f*) 48 & 49 Vict. c. 61.

(*g*) See 50 & 51 Vict. c. 52, and 52 & 53 Vict. c. 16.

(*h*) See Hale, Hist. C. L. c. 9 ; Rex v. Cowle, 2 Burr. 853 ; Com. Dig. Scotland (B.) ; Mayor of Berwick v. Shanks, 3 Bing. 459.

(*i*) By the 48 & 49 Vict. c. 23, Berwick is now included (for elec-

[in some sense, a county of itself; that is, a *county of a town corporate* (*j*): as to the effect of which, the reader is referred to the observations which we shall have occasion presently to make when we come to explain the nature of counties corporate (*k*).

Fourthly, as regards *Ireland* (*l*):—The inhabitants of Ireland, at the time of the conquest of that island by Henry the second, were governed by what they called the Brehon law, so styled from the Irish judges having been denominated Brehons (*m*). But on such conquest, the laws of England were received and sworn to by the Irish nation, assembled at the council of Lismore (*n*). And afterwards King John, in the twelfth year of his reign, went into Ireland, and carried over with him many able sages of the law; and there by his letters patent, in right of the dominion of conquest, he ordained and established that Ireland should be governed by the laws of England (*o*); which letters patent Sir Edward Coke apprehends to have been there confirmed in parliament (*p*). But to this ordinance many of the Irish were averse, and still stuck to their Brehon law: so that both Henry the third (*q*) and Edward the first (*r*) were obliged to renew the injunction; and at length in a parliament holden at Kilkenny, 40 Edw. III., under Lionel Duke of Clarence,

tion purposes) in the county of Northumberland. Also, by the Local Government Act, 1888 (51 & 52 Vict. c. 41), Berwick is (for the purposes of that Act) portion of the same county.

(*j*) See 5 & 6 Will. 4, c. 67, ss. 61, 109; 6 & 7 Will. 4, c. 103, s. 6.

(*k*) Vide post, p. 135.

(*l*) As to Ireland, see 4 Inst. 349.

(*m*) 4 Inst. 358; Edm. Spenser's State of Ireland, p. 1513, edit. Hughes.

(*n*) Pryn. on 4 Inst. 249.

(*o*) See *Craw v. Ramsay*, Vaugh. 294; 2 Pryn. Rec. 85; Calvin's case, 7 Rep. 23; *Campbell v. Hall*, Cowp. 210.

(*p*) Co. Litt. 141.

(*q*) A. R. 30; 1 Rym. Fœd. 442.

(*r*) A. R. 5.—“*Pro eo quod leges quibus utuntur Hybernici Deo detestabiles existunt, et omni juri dissonant, adeo quod leges censerī non debeant, nobis et concilio nostro satis videtur expediens, eisdem utendas concedere leges Anglicanas.*” — Pryn. Rec. 1218.

[the then Lieutenant of Ireland, the Brehon law was formally abolished, it being unanimously declared to be indeed no law, but a lewd custom crept in of later times. And yet, even in the reign of Queen Elizabeth, the wild natives still preserved their Brehon law; which is described to have been “a rule of right unwritten, but “delivered by tradition from one to another, in which “oftentimes there appeared great show of equity in determining the right between party and party, but in many “things repugnant quite both to God’s law and man’s” (s).

Notwithstanding the settlement of Ireland by King John, the sovereignty there was only entitled the dominion or lordship of Ireland (t), and the king’s style there was only *Dominus Hiberniæ*, lord of Ireland, till the thirty-third year of King Henry the eighth, when that sovereign assumed the title of king, which title was also recognized by act of parliament, 35 Hen. VIII. c. 3. But as Ireland was a distinct dominion, and had parliaments of its own, it is to be observed, that though the immemorial customs (or common law) of England were made the rule of justice in Ireland also, yet no acts of the English parliament, since the twelfth of King John, extended into that kingdom; unless indeed Ireland was specially named, or was included under general words, such as “within any of the king’s dominions.” And this is particularly expressed, and the reason given, in the Year Books; where it is said, “a tax granted by the parliament of England shall not “bind the people of Ireland, because they are not summoned to our parliament;” and again, “Ireland hath a “parliament of its own, and maketh and altereth laws; “and our statutes do not bind them, because they do not “send knights to our parliament (u); but their persons are “the king’s subjects, like as the inhabitants of Calais,

(s) See Spenser’s State of Ireland, p. 1513.

(t) Stat. Hiberniæ, 20 Hen. 3.

(u) Lord Coke, citing this in

Calvin’s case, inserts the following parenthesis, viz. (“which is to be understood *unless specially named*”).

7 Rep. 22.

[“ Gascoigne, and Guienne, while they continue under the “ king’s subjection ” (*x*). The general run of laws, enacted by the superior state, are supposed to be calculated for its own internal government, and do not extend to its distant dependent countries, which, bearing no part in the legislature, are not therefore in its ordinary and daily contemplation. But when the sovereign legislative power sees it necessary to extend its care to any of its subordinate dominions, and mentions them expressly by name, or includes them under general words, there can be no doubt but that they are then bound by its laws (*y*).

The original method of passing statutes in Ireland was nearly the same as in England, the chief governor holding parliaments at his pleasure, and these parliaments enacting such laws as they thought proper (*z*). But an ill use being made of this liberty, particularly by Lord Gormanstown, deputy-lieutenant in the reign of Edward the fourth (*a*), a set of statutes was enacted in the tenth year of Henry the seventh (Sir Edward Poynings being then Lord Deputy, whence these statutes are called Poynings’ laws); and by one of Poynings’ laws (*b*), in order to restrain the power as well of the deputy as of the Irish parliament, it was provided,—1. That, before any parliament be summoned or holden, the chief governor and council of Ireland shall certify to the king, under the great seal of Ireland, the considerations and causes thereof, and the articles of the acts proposed to be passed therein; and 2. That after the king, in his council of England, shall have considered, approved or altered the said acts or any of them, and certified them back under the great seal of England, and shall have given licence to summon and hold a parliament, then the same shall be summoned and held; and therein the said acts so certified, and no other,

(*x*) 20 Hen. 6, 8; 2 Rich. 3, 12.

(*a*) Ib. 10 Hen. 7, c. 23.

(*y*) Year Book, 1 Hen. 7, 3;
Calvin’s case, 7 Rep. 22.

(*b*) Irish Stat. 10 Hen. 7, c. 4,
expounded by 3 & 4 Ph. & M. c. 4.

(*z*) Irish Stat. 11 Eliz. st. 3, c. 8.

[shall be proposed, received, or rejected (*c*). But as this statute precluded any laws from being proposed but such as were pre-conceived before the parliament was in being, which occasioned many inconveniences, and made frequent dissolutions necessary, it was afterwards provided by the Irish statute of 3 & 4 Ph. & Mary, c. 4, that any new propositions might be certified to England in the usual form, even after the summons and during the session of parliament. Still, however, there was nothing left to the parliament in Ireland, but a bare negative or power of *rejecting*, not of proposing or altering any law.] But the usage afterwards was, that bills were often framed in either house, under the denomination of “heads for a bill or bills” and in that shape were offered to the consideration of the lord lieutenant and privy council: who, upon such parliamentary intimation, or otherwise upon the application of private persons, received and transmitted such heads, or rejected them without any transmission to England. With regard, however, to “Poynings’ laws” in particular, none of them could be repealed or suspended unless the bill for that purpose, before it was certified to England, had been approved by both houses (*d*).

[By another of “Poynings’ laws” (*e*), it was enacted that all acts of parliament before made in England, should be of force within the realm of Ireland (*f*);] but by the same rule, by which the people of Ireland were not (apart from this statute) bound by acts of the English parliament passed *before* this statute, which did not specially name or refer to Ireland, so the people of Ireland were not bound by any acts of the English parliament, passed *after* this statute, which did not specially name or refer to Ireland (*g*);

(*c*) 4 Inst. 353.

(*d*) Irish Stat. 11 Eliz. st. 3, c. 8.

(*e*) Cap. 22.

(*f*) 4 Inst. 351.

(*g*) 12 Rep. 112. By the Act,

however, of the Irish parliament, 21 & 22 Geo. 3, c. 48 (Yelverton’s Act), it was enacted, that certain statutes then made in England or Great Britain, relating to the sub-

on the other hand, where Ireland *was* particularly named or referred to, or was included under general words, the people of Ireland were bound by all such acts of parliament, this result following from the very nature and constitution of a dependent state : [dependence being very little else but an obligation to conform to the will or law of that superior upon which the inferior depends, and who, if they will but acknowledge his mastery, will treat them for the future as subjects, and not as enemies (*h*). However, as regards Ireland, this state of dependence was soon forgotten, and was even disputed by the Irish nation ; and therefore by statute 6 Geo. I. c. 5, it was declared, that the kingdom of Ireland ought to be subordinate to, and dependent upon, the imperial crown of Great Britain, as being inseparably united thereto ; and that the king's majesty, with the consent of the lords and commons of Great Britain in parliament, had power to make laws to bind the people of Ireland,] *scil.*, if Ireland was named or referred to in the Act.

The dependence of Ireland upon England being thus declared and established, that dependence extended also to its courts of justice ; wherefore a writ of error (in the nature of an appeal) lay from the Court of King's Bench in Ireland to the Court of King's Bench in England (*i*), and an appeal from the Court of Chancery in Ireland lay immediately to the English House of Lords, and the peers of Ireland had no jurisdiction either to affirm or to reverse any judgments or decrees whatsoever of the courts in Ireland (*k*).

It is true, that Ireland subsequently re-asserted for a time her independence,—the statute of 6 Geo. I. above

jects therein enumerated, save so far as the same had been altered or repealed, should be accepted, used, and executed in Ireland.

(*h*) Puff. Law of Nations, viii. 6, 24.

(*i*) This was law in the time of Hen. VIII., as appears by the antient book, intituled *Diversity of Courts*, c. *Bank le Roy*.

(*k*) So declared by 6 Geo. 1, c. 5.

mentioned, having been repealed by 22 Geo. II. c. 53, and the parliament and courts of Ireland having by 23 Geo. III. c. 28 acquired again an exclusive right in all matters of legislation and judicature in that country; but that independence was short lived, Ireland becoming again, by the Act of Union for Ireland (39 & 40 Geo. III. c. 67), an integral portion of the United Kingdom, subject to the provisions of that Act and of the "Articles of Union," the most important of which were as follows (*l*):—

1. That the kingdoms of Great Britain and Ireland shall, on the 1st day of January, 1801, and for ever after, be united into one kingdom, by the name of the United Kingdom of Great Britain and Ireland;

2. That the succession to the crown of the United Kingdom shall continue the same as the succession to the crown of Great Britain and Ireland before the union;

3. That there shall be one parliament, styled the Parliament of the United Kingdom of Great Britain and Ireland;

4. That twenty-eight peers of Ireland, elected for life by the peers of Ireland, shall sit in the House of Lords of the United Kingdom; and that one hundred (now one hundred and three) commoners shall sit in the House of

(*l*) These Articles are repeated in the Act of the Irish Parliament, 40 Geo. 3, c. 38. Under the Act of Union, the number of Irish members of the House of Commons was 100; but by 2 & 3 Will. 4, c. 88, it was raised to 105; and the number is now 103. The Act of Union also contained a stipulation that four lords spiritual of Ireland by rotation of sessions should sit in the House of Lords, and also the following clause:— "That the churches of England and Ireland shall be united into one Protestant episcopal church, to be called the United Church of England and Ireland: that the doctrine, worship,

discipline, and government of such church shall be the same as that of the church of England; and *that the continuance and preservation of such united church as the established church of England and Ireland, shall be an essential and fundamental part of the union;*" but in the year 1870, the Parliament of the United Kingdom put an end to this connection of the church of Ireland with that of England, and also deprived the archbishops and bishops of the church of Ireland of their seats in the House of Lords. See 32 & 33 Vict. c. 42; also 35 & 36 Vict. cc. 13, 90; and 42 & 43 Vict. c. 67.

Commons of the United Kingdom on the part of Ireland; that any peer of Ireland not elected one of the twenty-eight may serve in the House of Commons of the United Kingdom for any county, city or borough of Great Britain; but, while so serving, shall not be entitled to privilege of peerage, or to be elected one of the twenty-eight, or to vote at such election: and that all the peers of Ireland, (except those who may be members of the House of Commons of the United Kingdom,) shall have all privilege of peerage as fully as those of Great Britain;—the right of sitting in the House of Lords only excepted;

5. That the subjects of Great Britain and Ireland shall all be entitled to the same privileges with regard to trade and navigation (*m*);

6. That the future expenditure of the united kingdom shall be defrayed in such proportion as the parliament thereof shall from time to time deem just and reasonable; and

7. That all the laws and courts of each kingdom shall remain the same as already established, subject to such alterations and regulations as circumstances may appear to the parliament of the united kingdom to require; but that all writs of error and appeals which might, before the union, have been decided in the House of Lords of either kingdom, shall henceforth be decided by the House of Lords of the united kingdom (*n*).

Finally, it is to be observed, that since the union all Acts of Parliament extend to Ireland, whether that portion of the united kingdom be mentioned or not, unless it be expressly excepted, or the intention to except it be otherwise plainly shown.

Fifthly, as regards the other Islands adjacent to, and which are subject to the Crown of, Great Britain:—Some

(*m*) See Attorney - General *v.* M'Kenzie, 11 Price, 284.

(*n*) See the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 3.

of them (as the Isles of Wight (*o*), Portland, Thanet, &c.) are comprised within some neighbouring county, and are therefore to be looked upon as forming part of the kingdom of England (*p*) ; but the others of them require more particular consideration.

The Isle of Man is a distinct territory from England, and is not, in general, governed by the laws of England (*q*), but by acts of its own local legislature, called the *House of Keys* ; neither does any Act of Parliament extend thereto, unless it be specially named (*r*) : nor (the writ of *habeas corpus* excepted) does process run there from the English courts (*s*). [The Isle of Man was formerly a subordinate feudatory kingdom, subject to the kings of

(*o*) The Isle of Wight, for the purpose of *parliamentary representation*, used to be a county of itself, separate from Hampshire, and to return one member (see 2 Will. 4, c. 45. s. 16) ; and now, under the Redistribution of Seats Act, 1885 (48 & 49 Vict. c. 23), it returns one member.

(*p*) Com. Dig. Navigation, F. 5 ; 4 Inst. 287.

(*q*) See Com. Dig. Navigation, F. 2 ; Co. Litt. 9 a ; Calvin's case, 7 Rep. 21 ; 4 Inst. 283.

(*r*) 4 Inst. 284 ; 2 And. 116. The phrase "*British Islands*" now means (by 52 & 53 Vict. c. 63, s. 18) the United Kingdom, the Channel Islands, and the Isle of Man. As to the *excise* in the Isle of Man, see 7 & 8 Geo. 4, c. 53, s. 3 ; 50 & 51 Vict. c. 5. As to *customs* there, see 27 & 28 Vict. c. 62 ; 29 & 30 Vict. c. 23 ; 37 & 38 Vict. c. 46 ; 39 & 40 Vict. c. 36 ; 42 & 43 Vict. cc. 21, 36 ; 51 & 52 Vict. c. 7 ; 55 & 56 Vict. c. 28. As to *probate commissioners* for the island, 21 & 22 Vict. c. 95. s. 30. As to its *harbours*, 26

& 27 Vict. c. 86 ; 27 & 28 Vict. c. 62 ; 29 & 30 Vict. c. 23 ; 35 & 36 Vict. c. 23 ; 37 & 38 Vict. c. 8 ; 46 & 47 Vict. c. 9 ; 47 Vict. c. 7. As to *costs in revenue proceedings* there, 25 & 26 Vict. c. 14. As to *forest claims* there, 28 & 29 Vict. c. 28 ; and as to *metalliferous mines* there, 54 & 55 Vict. c. 47. As to the operation there of the "*Ecclesiastical Leasing Acts*, 1842 & 1858," 29 & 30 Vict. c. 81 ; and as to *stock-transfers*, 55 & 56 Vict. c. 35. As to the 7 Will. 4 & 1 Vict. 45, s. 6, not applying there, 33 & 34 Vict. c. 51. As to the *superannuation of officers* there, 39 & 40 Vict. c. 43 ; 45 & 46 Vict. c. 46 ; as to *colonial prisoners*, 47 & 48 Vict. c. 31 ; as to *Manx children and reformatory schools*, 47 & 48 Vict. c. 40 ; and as to *penal servitude*, 54 & 55 Vict. c. 69. As to *savings banks* there, 50 & 51 Vict. c. 40. As to *telegraphs and post offices* there, 52 & 53 Vict. c. 34 ; 55 & 56 Vict. c. 24.

(*s*) See *Re Brown*, 33 L. J. (N. S.) Q. B. 193.

[Norway; then to Kings John and Henry the third of England: afterwards to the kings of Scotland; and then again to the crown of England; and then at length we find king Henry the fourth claiming the island by right of conquest, and disposing of it to the Earl of Northumberland; upon whose attainder it was granted (by the name of the lordship of Man) to Sir John de Stanley by letters patent 7 Hen. IV. (*t*). The island thereafter continued for eight generations in the possession of the lineal descendants of Sir John de Stanley, the grantee of Henry the fourth, till the death of Ferdinando, Earl of Derby, A.D. 1594; when a controversy arose concerning the inheritance thereof between Ferdinando's daughters and William his surviving brother; upon which, and a doubt that was started concerning the validity of the original patent (*u*), the island was seized into Queen Elizabeth's hands, and afterwards various grants were made of it by King James the first, all which being expired or surrendered, it was granted afresh in 7 Jac. I. to William Earl of Derby, and the heirs male of his body, with remainder to his heirs general; which last mentioned grant was the next year confirmed by Act of Parliament, with a restraint of the power of alienation by the said Earl and his issue male. On the death of James Earl of Derby, A.D. 1735, the male line of Earl William failing, the Duke of Atholl succeeded to the island as heir general by a female branch. In the meantime, though the title of king had long been disused, the successive Earls of Derby, as lords of Man, had maintained a sort of royal authority therein, by assenting to or dissenting from laws and exercising an appellate jurisdiction; though an appeal always lay from their decrees to the sovereign of Great Britain in council (*x*). But the distinct jurisdiction of this little subordinate royalty being found inconvenient for the pur-

(*t*) Selden, Tit. Hon. 1, 3.(*u*) Camden, Eliz. A.D. 1594.(*x*) Christian *v.* Corren, 1 P.

Wms. 329.

[poses of public justice, and for the revenue, (affording as it did a commodious asylum for debtors, outlaws, and smugglers,) authority was given to the Treasury by statute 12 Geo. I. c. 28, to purchase the interest of the then proprietors therein for the use of the Crown. And this purchase was completed in the year 1765,—and was confirmed by statutes 5 Geo. III. cc. 26 and 39,—whereby the whole island and all its dependencies so granted as aforesaid, (except the landed property and some other rights of the Atholl family,) became inalienably vested in the Crown (*y*).

The islands of Jersey, Guernsey, Sark, Alderney, and their appendages, (often called the Channel Islands,) were antiently parcel of the duchy of Normandy, and were united to the crown of England by the first princes of the Norman line (*z*). These islands are governed by their own laws, which are for the most part the ducal customs of Normandy, being collected in an antient book intituled *Le Grand Coustumier* (*a*). The writ or process of the sovereign from the English courts is in ordinary cases of no force in these islands (*b*); but his commission is (*c*). They are not bound by common Acts of the English parliament, unless particularly named. All causes are determined in the first instance by their own officers, the bailiffs and *jurats* of the islands (*d*); but

(*y*) An additional compensation for this cession was afterwards granted to the Duke of Atholl by 45 Geo. 3, c. 123. And see 6 Geo. 4, c. 34.

(*z*) As to these, see 4 Inst. 286; Calvin's case, 7 Rep. 20 b; Martin v. McCulloch, 1 Moore, Priv. Coun. Rep. 308.

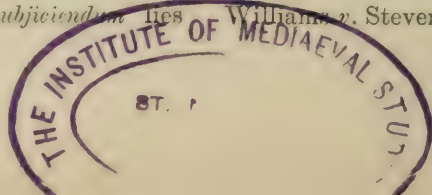
(*a*) See Hale, Hist. Com. Law, c. 6.

(*b*) Inst. ubi sup. It may be observed, however, that a writ of *habeas corpus ad subjiciendum* lies

into the Channel Islands, under the provisions of 31 Car. 2, c. 2, and 56 Geo. 3, c. 100. (See Carus Wilson's case, 7 Q. B. 984.)

(*c*) As to appointing probate commissioners there, see 21 & 22 Vict. c. 95, s. 30; and as to the post office, see 55 & 56 Vict. c. 24; and as to penal servitude, see 54 & 55 Vict. c. 69.

(*d*) As to the *jurats* and the constitution of the Royal Court of Jersey, see Law Rep., 1 P. C. 94; Williams v. Stevens, ib. 352.



[appeal lies from them to the sovereign in council in the last resort.]

Sixthly, as regards the more distant possessions or dependencies of the British Crown in various quarters of the globe:—Most of these are usually called *colonies*, and whenever in the course of what follows that term is used, it is to be understood as referring to them all (*e*). Colonies, it is to be observed, are no part of the mother country, but distinct (though dependent) dominions. In general, they are either gained from other states by conquest or cession, or else they are acquired by right of occupancy only, that is, by finding them desert and uncultivated, and peopling them from the mother country.

Both the right by conquest or cession and that by occupancy are founded upon the law of nature, or at least upon that of nations. But there is a difference between the two species of colonies, with respect to the laws by which they are bound. For in conquered or ceded countries that have already laws of their own, those laws remain in force until changed by competent authority (*f*) ; and the common law of England, as such, has no authority there : [on the other hand, if an uninhabited country be discovered and planted by English subjects, all the English laws then in being—which are the birthright of every subject (*g*)—are immediately there in force (*h*). But this must be understood with very many and very great restrictions ; for such colonists carry with them only so much of the English law as is applicable to their new situation, and to the condition of an infant colony ; such, for instance, as the general rules of inheritance, and of

(*e*) As to the term “colony,” see 28 & 29 Vict. c. 63, s. 1 ; c. 113, s. 1 ; and 52 & 53 Vict. c. 63, s. 18.

(*f*) *Campbell v. Hall*, Cowp. 204 ; 2 P. Wms. 75 ; *Rex v. Vaughan*, 4 Burr. 2500.

(*g*) See *Campbell v. Hall*, ubi sup.

(*h*) *Blankard v. Galdy*, Salk. 411 ; S. C. 4 Mod. 215 ; see *Smith v. Brown*, Salk. 666.

[protection from personal injuries. The artificial refinements and distinctions incident to the property of a great commercial people, the laws of police and revenue (such especially as are enforced by penalties), the maintenance of an established clergy, the jurisdiction of the spiritual courts, and a multitude of other provisions incident to special enactments, or which have resulted from special doctrines of the municipal law (*i*), are neither necessary nor convenient for them, and therefore are not in force.]

The sovereign exercises, as to colonies of every description, the right of appointing governors (*j*), and of issuing warrants for the appointment of officers, whether judicial, administrative or ecclesiastical (*k*). The right of legislation, too, is in some cases vested in the Crown; for any colony which has been acquired by conquest or cession is subject to such laws as the sovereign in council may impose (*l*), or to such as may be imposed by any legislative council established in the colony under the royal authority. This does not extend, however, to colonies acquired by occupancy; for in these the Crown possesses no such legislative right. The sovereign may, nevertheless, in any colony, however acquired, direct the governor to summon a representative assembly from among the inhabitants themselves for the purpose of interior legislation; and it is an established

(*i*) *Att.-Gen. v. Stewart*, 2 Mer. 143; *Whicker v. Hume*, 7 H. L. Ch. 134; *Jex v. M'Kinney*, 14 App. Ca. 77; *Cooper v. Stuart*, *ibid.* 286.

(*j*) The term "governor" of a colony is defined in 26 & 27 Vict. c. 84, s. 2; and see 52 & 53 Vict. c. 63, s. 18. As to the *retiring pensions* of colonial governors, see 28 & 29 Vict. c. 113; 35 & 36 Vict. c. 29.

(*k*) We may observe here, that, of late years, *bishops* have been

appointed for the colonies; as to whom, see 31 Geo. 3, c. 31; 59 Geo. 3, c. 60; 3 & 4 Vict. c. 33; 5 & 6 Vict. c. 4, s. 119; 15 & 16 Vict. cc. 52, 53, 88; 16 & 17 Vict. c. 49. (See *Re The Bishop of Natal*, 3 Moo. P. C. (N. S.) 115; and *Bishop of Natal v. Gladstone*, Law Rep., 3 Eq. 1.) As to the colonial clergy, see also 37 & 38 Vict. c. 77.

(*l*) *Calvin's case*, 7 Rep. 17 b; *Campbell v. Hall*, Cowp. 211.

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principle, that a conquered or ceded colony, to which the Crown has once thus granted a representative legislature, is no longer subject to legislation by the Crown (*m*). Such would seem, in a general point of view, to be the extent of the royal power in the colonies acquired either by conquest, cession, or occupancy ; but in connection with this subject, it is proper also to notice the Foreign Jurisdiction Act, 1890 (*n*), by which (re-enacting a like provision in the 6 & 7 Vict. c. 94) it has been declared that it shall be lawful for her majesty to exercise any power or jurisdiction that she has or may have within any foreign country or place *out* of her dominions, in the same and as ample a manner as if such power or jurisdiction had been obtained by cession or conquest (*o*) : and that everything done in pursuance of such power or jurisdiction in any foreign country shall be as valid as if it had been done according to the local law then in force within such country ; and, further, that if in any proceeding, civil or criminal, in any court of her majesty any question arises as to the existence or extent of such power or jurisdiction, questions properly framed shall be transmitted to a principal secretary of state, and his answers thereon shall be final and conclusive evidence of the matters therein contained (*o*).

Such being the nature of the authority of the Crown in our colonial possessions (as to which authority we may add that it is exercised through the agency of a principal secretary of state, called the secretary of state for the colonies), it is almost superfluous to remark that they are all, under all circumstances and whatever may be their

(*m*) *Campbell v. Hall*, ubi sup.; *Att.-Gen. v. Stewart*, 2 Meriv. 158. As to the powers of colonial legislatures, see 26 & 27 Vict. c. 84; 28 & 29 Vict. c. 63, s. 5. See also *Phillips v. Eyre*, Law Rep., 6 Q. B. 1.

(*n*) 53 & 54 Vict. c. 37, by which Act are consolidated the provisions contained in the earlier Acts, commencing, in 1843, with 6 & 7 Vict. c. 94, and ending, in 1881, with 44 & 45 Vict. c. 69.

(*o*) 53 & 54 Vict. c. 37, ss. 1, 3, 4,

political constitution, subject to the legislative control of the British parliament. It was the exercise by parliament of this general right, for the particular purpose of raising a revenue by colonial taxation, that led to that famous dispute between the mother country and her North American provinces, which ultimately terminated in the independence of the latter (*p*). The existence of the right in this, as in other cases, was during the controversy asserted by the Act 6 Geo. III. c. 12, which declared that all his majesty's colonies or plantations in America were subordinate to, and dependent upon, the imperial crown and parliament of Great Britain, and liable to be bound by its laws and statutes, in all cases whatsoever; though by a subsequent statute (18 Geo. III. c. 12), it was thought expedient to add that no power of *taxation*, as regarded America, would for the future be exercised for the benefit of the mother country, a principle which has been since maintained with regard to all of our colonial possessions. But the general right of the mother country to legislate for the colonies is (excepting in the matter of taxation) still preserved, and is recognized in the Colonial Laws Validity Act, 1865 (*q*), hereinafter more particularly referred to.

But though it is competent to parliament to legislate for the colonies, yet a colony is not considered as affected by Acts of Parliament passed after its acquisition, and while it is subject to other legislative authority, unless it be referred to in the Act by name, or by general description, such as "the colonies;" or unless the Act be, in its nature, obviously intended to affect all our possessions wherever situate. In the case of a colony acquired by occupancy, Acts of Parliament passed before

(*p*) By 22 Geo. 3, c. 46, his majesty was empowered to conclude a truce or peace with these colonies; and by a definitive treaty signed at Paris, 3rd September, 1783, the

United States of America was acknowledged to be free, sovereign, and independent.

(*q*) 28 & 29 Vict. c. 63.

its acquisition come into force immediately upon that event, as part of the general law of England—as to all provisions at least not unsuitable to the social circumstances of the colony. But a colony won by conquest or cession, is not in general affected by statutes of the united kingdom passed before its acquisition.

Such being the general principles of law applicable to colonies, we may next advert to the actual constitution of those which at present belong to the British Crown (*r*).

(*r*) As to these, see the following Acts:—

Africa, 1 & 2 Geo. 4, c. 28; 6 & 7 Vict. c. 13; 21 & 22 Vict. c. 35. *Africa (South)*, 40 & 41 Vict. c. 47. *Africa (West)*, 1 & 2 Geo. 4, c. 28; 16 & 17 Vict. c. 86; 24 & 25 Vict. c. 31; 34 & 35 Vict. c. 8. *America*, 6 Geo. 3, c. 12; 59 Geo. 3, c. 38; 1 & 2 Geo. 4, c. 66; 16 & 17 Vict. c. 107, ss. 181, 185, 187; 22 & 23 Vict. c. 26; 35 & 36 Vict. c. 45. *Australia*, 18 & 19 Vict. c. 56; 24 & 25 Vict. c. 44; 36 & 37 Vict. c. 22; and (*Australasia*, defence of) 51 & 52 Vict. c. 32; and (*Australasia*, federation of) 48 & 49 Vict. c. 60. *Australia (South)*, 5 & 6 Vict. c. 61; 13 & 14 Vict. c. 59; 24 & 25 Vict. c. 44; 25 & 26 Vict. c. 11; 29 & 30 Vict. c. 74. *Australia (West)*, 13 & 14 Vict. c. 59; 25 & 26 Vict. c. 11; 29 & 30 Vict. c. 74; 53 & 54 Vict. c. 26. *Bechuanaland and Basutoland*, 52 & 53 Vict. c. 38. *British Columbia*, 22 & 23 Vict. c. 26; 29 & 30 Vict. c. 67; 33 & 34 Vict. c. 66; 55 & 56 Vict. c. 52. *British Honduras*, 44 & 45 Vict. c. 36. *British Kaffraria*, 28 & 29 Vict. c. 5. *Canada*, 14 Geo. 3, cc. 83, 88; 1 & 2 Geo. 4, c. 66; 6 Geo. 4, cc. 59, 75; 9 Geo. 4, c. 51; 3 & 4 Vict. c. 35; 14 & 15 Vict.

c. 63; 19 & 20 Vict. c. 23; 20 & 21 Vict. c. 34; 30 & 31 Vict. c. 3; 31 & 32 Vict. c. 135; 32 & 33 Vict. c. 11, s. 7; c. 101; 34 & 35 Vict. c. 28; 38 & 39 Vict. cc. 38, 53; 49 & 50 Vict. cc. 13, 35; 52 & 53 Vict. c. 28. *Cape of Good Hope*, 28 & 29 Vict. c. 5; 40 & 41 Vict. c. 17; 48 & 49 Vict. c. 7. *China*, 3 & 4 Will. 4, c. 93; 22 & 23 Vict. c. 9. *Falkland Islands*, 6 & 7 Vict. c. 13. *Heligoland*, 53 & 54 Vict. c. 32. *Hong-Kong*, 18 & 19 Vict. c. 104. *Leeward Islands*, 34 & 35 Vict. c. 107. *Mauritius*, 55 & 56 Vict. c. 49. *New Brunswick*, 14 & 15 Vict. c. 63; 20 & 21 Vict. c. 34; 30 & 31 Vict. c. 3; 38 & 39 Vict. c. 38. *Newfoundland*, 49 Geo. 3, c. 27; 59 Geo. 3, c. 38; 5 Geo. 4, c. 67; 6 Geo. 4, c. 59; 2 & 3 Will. 4, c. 78; 5 & 6 Vict. c. 120; 12 & 13 Vict. c. 21; 35 & 36 Vict. c. 45. *New South Wales*, 54 Geo. 3, c. 15; 9 Geo. 4, c. 83; 5 & 6 Will. 4, c. 62; 3 & 4 Vict. c. 62; 5 & 6 Vict. c. 76; 7 & 8 Vict. c. 74; 12 & 13 Vict. c. 22; 13 & 14 Vict. c. 59; 18 & 19 Vict. c. 54; 24 & 25 Vict. c. 44; 25 & 26 Vict. c. 11; 29 & 30 Vict. c. 74. *New Zealand*, 3 & 4 Vict. c. 52; 9 & 10 Vict. c. 103; 10 & 11 Vict. c. 112, s. 19; 11 & 12 Vict. c. 5; 12 & 13 Vict. c. 79; 13 & 14

And here a great variety is observable. In every case they are subject to a local governor (the representative and deputy of the sovereign), who acts under the royal commission, and the royal instructions by which the commission is usually accompanied(s). In every case, too, the law is administered by local judges deriving

Vict. c. 70; 14 & 15 Vict. cc. 84, 86; 15 & 16 Vict. c. 72; 20 & 21 Vict. c. 53; 25 & 26 Vict. c. 48; 26 & 27 Vict. c. 23; 31 & 32 Vict. cc. 57, 92. *Norfolk Island*, 4 & 5 Will. 4, c. 65. *Nova Scotia*, 30 & 31 Vict. c. 3; 38 & 39 Vict. c. 38. *Queen's Land*, 24 & 25 Vict. c. 44. *Straits Settlements*, 3 & 4 Vict. c. 56; 11 & 12 Vict. c. 21; 18 & 19 Vict. c. 93; 20 & 21 Vict. c. 75; 29 & 30 Vict. c. 115; 30 & 31 Vict. c. 45, s. 17; 32 & 33 Vict. c. 83; 33 & 34 Vict. c. 55; 37 & 38 Vict. c. 38. *Vancouver's Island*, 12 & 13 Vict. c. 48. *Van Diemen's Land*, 6 Geo. 4, c. 39; 9 Geo. 4, c. 83; 5 & 6 Vict. c. 76, s. 53; 7 & 8 Vict. c. 74, s. 6; 10 & 11 Vict. c. 57; 13 & 14 Vict. c. 59; 25 & 26 Vict. c. 11; 29 & 30 Vict. c. 74. *Victoria*, 54 Geo. 3, c. 15; 2 & 3 Vict. c. 70; 5 & 6 Vict. c. 76; 7 & 8 Vict. cc. 72, 74; 13 & 14 Vict. c. 59; 18 & 19 Vict. c. 55; 25 & 26 Vict. c. 11; 29 & 30 Vict. c. 74. Moreover, with respect to the WEST INDIES, we may notice the following Acts: *For the relief of certain Colonies and plantations therein*, 2 & 3 Will. 4, c. 125; 5 & 6 Will. 4, c. 51; 3 & 4 Vict. c. 40; 7 & 8 Vict. c. 17; 8 & 9 Vict. c. 50; 11 & 12 Vict. c. 38; 19 & 20 Vict. c. 35: *For the sale of encumbered estates therein*, 17 & 18 Vict. c. 117 (amended and continued by 21 & 22 Vict. c. 96; 25 & 26 Vict. c. 45; 27 & 28 Vict. c. 108;

35 & 36 Vict. c. 9; and provisions for its discontinuance contained in 49 & 50 Vict. c. 36): *For regulating the prisons there*, 1 & 2 Vict. c. 67: *For increasing the number of bishoprics therein*, 5 & 6 Vict. c. 4 (see 31 & 32 Vict. c. 120): *For establishing courts of appeal for certain of the West India Islands*, 13 & 14 Vict. c. 15; and (as to the *Windward Islands*) 52 & 53 Vict. c. 33: *For enabling her Majesty to confirm an act passed by Antigua as to Barbuda*, 22 & 23 Vict. c. 13: *To authorize the extension of a loan by West India relief commissioners to Dominica*, 30 & 31 Vict. c. 91: *As to loan to Jamaica*, 25 & 26 Vict. c. 55; 32 & 33 Vict. c. 69; 42 & 43 Vict. c. 16: *For the government of the Cayman Islands*, 26 & 27 Vict. c. 31: *To make provision for the government of Jamaica*, 29 & 30 Vict. c. 12: *To annex the Turks and Caicos Islands to the colony of Jamaica*, 36 & 37 Vict. c. 6: *To give an appeal from British Honduras to Jamaica*, 44 & 45 Vict. c. 36: *Constitutions of St. Vincent, Tobago, and Grenada*, 39 & 40 Vict. c. 47; and for the union of *Trinidad and Tobago*, 50 & 51 Vict. c. 44. - And as to the government of British settlements, see 50 & 51 Vict. c. 54.

(s) See 28 & 29 Vict. c. 63, s. 4, as to instructions to the colonial government from the mother country; see also 50 & 51 Vict. c. 54.

their authority from, but not in all cases appointed by, the crown; and an appeal is universally allowed from the decision of those judges to the sovereign in council here in England. But in other particulars our colonies differ widely from each other in their plan of government, some of them having received the gift of English laws, others remaining subject to the codes of foreigners, their former masters; some remaining under the legislative power of the crown itself, and others receiving their laws from a local legislative council, or from representative assemblies, established by authority of the crown or of parliament. With respect to those possessing assemblies of this latter description, it may be said that their whole interior policy is in general modelled upon that of the mother country. For having a governor (the representative of royalty), and royal courts of justice, they have also a local council, forming a sort of upper house, in addition to their general assembly, corresponding with our House of Commons: who, by their united authority, make laws suited to the necessities or requirements of the colony (*t*),—subject only to such restrictions as result from the subordination of these local establishments to the imperial parliament. But acts of assembly not only require the assent of the governor as representing the crown, before they can come even into temporary operation, but are liable to be afterwards annulled by a notification from this country of their having been *disallowed* by the sovereign in council (*u*); and they ought, in strictness, always to be reserved for the signification of her Majesty's pleasure (*v*). This subject is now also partly regulated by the Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), passed "to remove doubts as to the validity of colonial laws;" and by which Act it has been declared, that any colonial law *repugnant* in any respect to the provisions of

*See here
Direct. Com.
p. 109.*

(*t*) Vide post, bk. iv. pt. i. c. v.

(*v*) 56 & 57 Vict. c. 72.

(*u*) Clark's Colonial Law, 41.

any Act of Parliament extending to the colony, shall be void and inoperative to the extent of such repugnancy (*x*); on the other hand, that no colonial law, *unless* so made void and inoperative, is affected by its repugnancy to the law of England (*y*); and further, that every *colonial* legislature may establish courts and regulate the administration of justice in the colony; and that every *representative* legislature may make laws as to its own constitution, powers, and procedure (*z*).

Thus much as to our settlements in general (*a*). But there is a large class of them in the West Indies and elsewhere, which require our separate attention, on account of

(*x*) 28 & 29 Vict. c. 63, s. 2.

(*y*) Sect. 3. See also 16 & 17 Vict. c. 107, s. 190.

(*z*) By 28 & 29 Vict. c. 63, the term "*colonial legislature*" is to include any authority (other than the imperial parliament or her Majesty in council) which is competent to make laws for the colony or British possession.

(*a*) We may here notice the following statutes applicable to our colonies in general. As to the apprehension of fugitive offenders, 44 & 45 Vict. c. 49. As to the removal of prisoners, 47 & 48 Vict. c. 50. As to evidence, 6 & 7 Vict. c. 22. As to probates and administrations, 55 & 56 Vict. c. 6. As to letters-patent, 26 & 27 Vict. c. 76. As to registration of English companies in the colonies, 46 & 47 Vict. c. 30. As to the jurisdiction of the admiralty, 12 & 13 Vict. c. 96; 23 & 24 Vict. c. 88; 53 & 54 Vict. c. 27. As to the post-office, 12 & 13 Vict. c. 66. As to the proof of acts of state and legal proceedings, 14 & 15 Vict. c. 49, s. 7. As to the revenues of the crown, 15 & 16 Vict. c. 39. As to lighthouses, 18 & 19 Vict. c. 91.

As to crown lands, and the emigration commissioners, 18 & 19 Vict. c. 119. As to the ascertainment of the law, 22 & 23 Vict. c. 63; 24 & 25 Vict. c. 11. As to the relief of colonial attorneys, 47 & 48 Vict. c. 43. As to the trial of criminals, 23 & 24 Vict. c. 122. As to writs of habeas corpus, 25 & 26 Vict. c. 20. As to merchant shipping inquiries, 45 & 46 Vict. c. 76. As to certain Acts of legislatures, 26 & 27 Vict. c. 84. As to their naval defence, 28 & 29 Vict. c. 14. As to the validity of certain marriages, 28 & 29 Vict. c. 64. As to gold coins from branch mints, 33 & 34 Vict. c. 10. As to the registration of ships, 31 & 32 Vict. c. 129. As to the prevention of kidnapping, 35 & 36 Vict. c. 19, amended by 38 & 39 Vict. c. 51. As to the trial of crimes committed out of the local jurisdiction, 37 & 38 Vict. c. 27. As to stock, 40 & 41 Vict. c. 59; and as to stock transfers, 55 & 56 Vict. c. 35. As to fortifications, works, buildings and land, 40 & 41 Vict. c. 23. As to pensions for colonial services, 50 & 51 Vict. c. 13.

their connection with the former system of colonial slavery. From the earliest period of their acquisition, the produce of these colonies had been raised by the compulsory labour of the negro race ; and notwithstanding the peculiar freedom of her own institutions, and the pure form of Christianity which she professes, the mother country, until early in the present century, had never hesitated to lend her sanction to that method of cultivation (*b*). The conscience of the British public was, however, at length awakened first, to the atrocity of the traffic by which these plantations were continually supplied with new victims from the coast of Africa ; and at a later period, to the nature of the colonial bondage itself, which was shown to exceed even the servile system of Pagan Rome in its severity, and to be without parallel in the history of human oppression. The slave trade, after a long and obstinate opposition from the parties interested, was abolished in 1807 (*c*)—and after another protracted interval, during which the duty of ameliorating the condition of the negroes in the colonies was confided (but in vain) to the colonial legislatures, the imperial parliament at length resolved to put an end, as from 1st August, 1834, to the system of slavery itself ; and the abolition of colonial slavery was carried into effect by an Act passed in 1833 (*d*). To justify this measure, however, it was thought necessary to award to the then slave proprietors the sum of twenty millions sterling, in compensation for the loss they sustained,—and also to interpose a certain period of probation during which

(*b*) Several of our statutes gave sanction to this system, as already established by the local laws of the colonies (see *Forbes v. Lord Cochrane*, 2 Barn. & Cress. 469) ; yet the condition of slavery has been long pronounced by our courts to be repugnant to the genius of the municipal law of England ; see the case just cited, and *Somerset's*

case, 11 St. Tr. 340 ; Lofft, 1.

(*c*) 47 Geo. 3, st. 1, c. 36. The foreign slave trade, viz. the supply of foreign countries with slaves, was abolished in 1806, by stat. 46 Geo. 3, c. 52 ; and the supply of our own conquered colonies had been previously forbidden by order in council in 1805.

(*d*) 3 & 4 Will. 4, c. 73.

the slaves, instead of passing suddenly into absolute liberty, should be considered as apprentices, and be held in that species of subjection to their former masters. But in the result, the masters themselves found it expedient to abandon the system of apprenticeship before the prescribed time had expired; and, by acts of their own legislatures throughout the different colonies, admitted their apprentices into the state of pure freedom at a period somewhat earlier than they would otherwise have been entitled to its enjoyment (*e*).

Our possessions in the East Indies (or in India) are also entitled, from their superior extent and importance, to specific notice. In 1708 two rival associations existed in England for the purposes of the East India traffic; but in that year these two associations were consolidated into one by Act of Parliament (*f*), with the exclusive privilege of trading to the East Indies and other specified places (*g*);—a privilege repeatedly renewed by successive subsequent grants. This new body was originally incorporated by the name of “The United Company of Merchants of England trading to the East Indies;” but convenience attached to them the shorter appellation of “The East India Company,” which afterwards became by express provision their proper legal style (*h*). In the progress of their well-known history, they crushed upon the Indian peninsula the power of the rival settlers from France; and though first instituted for purposes merely commercial, their policy, as administered by the governors whom they sent out, gradually led to the acquisition of immense territorial dominions, by which they became effectively (though subject to the

(*e*) Besides the Acts above cited, see also the following, connected with the subject of slavery and its suppression: 9 Geo. 4, c. 84; 5 & 6 Will. 4, c. 45; 6 & 7 Will. 4, c. 5, c. 16, c. 82; 7 Will. 4 & 1 Vict. c. 91; 4 & 5 Vict. c. 18; 16 & 17

Vict. c. 86; 36 & 37 Vict. c. 59, c. 88; 39 & 40 Vict. c. 46; and 42 & 43 Vict. c. 38.

(*f*) 6 Ann. c. 71, s. 13.

(*g*) See 9 & 10 Will. 3, c. 44, s. 81.

(*h*) 3 & 4 Will. 4, c. 85, s. 111.

undoubted supremacy of the British Crown) the sovereigns of India (*i*). The unexampled grandeur of this company rendered the regulation of its affairs, for a long period of our history, an object of the highest interest and importance to the British nation. In consequence of the prevalence of great abuses, its constitution was newly arranged in 1773 by an Act of Parliament (*k*), prescribing the manner in which its Directors should be chosen from among its members, and the qualification which should entitle a member to vote in its affairs (*l*). In 1784, its administration of the East was brought under the superintendence of the executive government at home, by the establishment of the Board of Commissioners for the affairs of India, which operated as a check upon the Directors, and was afterwards generally called the “Board of Control” (*m*). Still, however, its commercial monopoly remained entire; but in 1813 it was provided, by the Act then passed for the temporary renewal of the company’s charter, that the trade from all places except China, and in all commodities except tea, should be thrown open (under certain restrictions and limitations) to every subject of the realm (*n*). And this proved but the prelude to a still more important change; for the expediency being at length generally recognized of admitting the capital of our private merchants to a free participation in every branch of the Indian traffic, an arrangement was accordingly made with the company for that purpose in 1832. This was carried into effect by the statute 3 & 4 Will. IV. c. 85; under which such exclusive rights of trading as the company still retained were abolished, and the company was debarred from engaging for the future in commercial transactions (*o*). And though the territories

(*i*) See *Gibson v. East India Company*, 5 Bing. N. C. 272; *Mayor of Lyons v. East India Company*, 1 Moore, Priv. Counc. Rep. 374.

(*k*) 13 Geo. 3, c. 63, explained and amended by 21 Geo. 3, c. 70.

(*l*) 13 Geo. 3, c. 63, s. 5.

(*m*) 24 Geo. 3, sess. 2, c. 25, and see 26 Geo. 3, c. 16, and 23 Geo. 3, c. 52.

(*n*) 53 Geo. 3, c. 155, s. 7.

(*o*) 3 & 4 Will. 4, c. 85, s. 3.

and other property in their possession, with the exception of St. Helena (which was by the same statute vested in the Crown), were allowed to remain under the government of the company, this was declared to be "in trust" only for "his majesty, his heirs and successors" (*p*). As for the local government of India, it was committed to a governor-general and a board of councillors, who, under the style of "The Governor-General of India in Council" (*q*), were invested with a superintending authority over all the local Indian governments called Presidencies, in all points relating to their civil and military administration (*r*); and with power to make laws for all persons, whether British or native, throughout the whole of the territories, and for all servants of the company within the dominions of allied states (*s*); subject, however, to a power in the Court of Directors to disallow any law so made (*t*); and also subject to the superintending and paramount authority of the imperial parliament (*u*). The ecclesiastical establishment of India was also remodelled by the same Act, and provision was thereby made for founding two bishoprics—those of Madras and Bombay—in addition to the diocese of Calcutta, already established. The Bishop of Calcutta, however, was declared to be the metropolitan bishop in India, with such jurisdiction and functions as the sovereign by letters patent should direct, subject nevertheless to the general superintendence and revision of the Archbishop of Canterbury (*x*). By 3 & 4 Will. IV. c. 85, the territories of India were to continue under the government of the East India Company until 30th April, 1854; but before the arrival of that time it was provided, by another statute

(*p*) 3 & 4 Will. 4, c. 85, ss. 1, 2.

(*u*) Sect. 81.

(*q*) Sect. 39. As to the powers of the Governor-General of India in Council, see also 32 & 33 Vict. c. 98.

(*x*) Sect. 94. See also the Acts referred to, sup. p. 102, n. (*k*). As

(*r*) 3 & 4 Will. 4, c. 85, s. 65.

to Indian bishops *on furlough*, see 34 & 35 Vict. c. 62, and 37 & 38

(*s*) Sect. 43.

Vict. c. 13.

(*t*) Sect. 44.

(16 & 17 Vict. c. 95), that even after that time these territories should so continue until parliament should otherwise provide. Such new provision, however, was in fact shortly afterwards made, and it was hastened by circumstances of an unexpected and disastrous kind. The Sepoy soldiery in India, having been led early in 1857 to entertain the belief that government was about to compel them in the course of their military duty to bite cartridges greased with the fat of certain animals (an act abhorrent from the Hindoo superstition, and fatal to caste), broke out into open mutiny, which soon ripened into an extensive rebellion of the natives in general against the British power, in the course of which many fearful atrocities were committed by them, and which was not suppressed till the close of 1858. Under these circumstances it appeared to parliament in the course of that year that a time had now arrived at which, for the more effectual administration of affairs, it was expedient that the crown should take to itself the sole and unqualified dominion over India; and by 21 & 22 Vict. c. 106 (intituled An Act for the better Government of India), it was accordingly provided that all powers and rights vested in the East India Company in trust for her Majesty should cease, and should become vested in her and be exercised in her name (*y*); and, conformably to this, the Act was soon afterwards followed by a proclamation of the Queen in council to the princes, chiefs and people of India, in which she formally claimed their allegiance.

This Act, besides providing for the direct sovereignty of the English crown in India (*z*), contained also specific provisions more or less ancillary thereto, that is to say,—provisions for the determination of the functions and powers theretofore vested in the Court of Directors and Court of Proprietors in relation to the government of

(*y*) Some years later, viz., in Vict. c. 17.

1874, the Company was dissolved
by Act of Parliament, 36 & 37

(*z*) 21 & 22 Vict. c. 106, s. 1.

India (*a*), and for the abolition of the Board of Control (*b*), and the provision that all persons who then held offices, employments or commissions, under the company in India, should thenceforth be deemed to hold them under her Majesty and be paid out of the revenues of India (*c*); and it contained also a great variety of enactments as to the manner in which the business to be transacted in this country, in relation to the Indian government, and the correspondence therewith, should in future be conducted (*d*), the general effect of which was, that such business and correspondence were to be conducted by a principal secretary of state in council (*e*); and that such council—of which he was to be president, with a power himself to vote (*f*)—should consist of fifteen members (*g*), under the style of the “Council of India,” by way of distinction from the council of the governor-general already established in that country (*h*); and that the members of the council should be salaried (*i*), and should hold office during good behaviour (*j*), but were not to be capable of sitting or voting in parliament (*k*); and by another of the enactments of this statute, it was provided, that all Acts and provisions then in force, under charter or otherwise concerning India, should, subject to the provisions of the statute, continue in force; and be construed as referring to the secretary of state in council, in lieu of the company and the court of directors and court of proprietors thereof (*l*).

(*a*) 21 & 22 Vict. c. 106, s. 60.

(*b*) Sect. 61.

(*c*) Sect. 58.

(*d*) Sect. 19.

(*e*) Sects. 3, 21.

(*f*) Sect. 21.

(*g*) By the Council of India (Reduction) Act, 1889 (52 & 53 Vict. c. 65), this number may be reduced, but not below *ten*.

(*h*) Sect. 7.

(*i*) Sect 13.

(*j*) Sect 11.

(*k*) Sect. 12. As to the constitution of the “Council of India,” see also 39 & 40 Vict. c. 7; 55 & 56 Vict. c. 14.

(*l*) 21 & 22 Vict. c. 106, s. 64. The principal statutes relating to India passed *prior* to 1858 are the following:—As to the administration of justice, 37 Geo. 3, c. 142; 39 & 40 Geo. 3, c. 79; 4 Geo. 4, c. 71; 6 Geo. 4, c. 85; 9 Geo. 4, c. 74. As to trade with India and China, 3 & 4 Will. 4, c. 93; 3 & 4

With a view to the recognition of the transfer of government from the East India Company to her Majesty effected by the statute 21 & 22 Vict. c. 106, above mentioned, and for divers other weighty reasons of state, it was subsequently thought expedient that an appropriate alteration should take place in the style and titles appertaining to the Imperial Crown of the United Kingdom and its dependencies; and accordingly, under the 39 & 40 Vict. c. 10, and a Royal Proclamation made under the authority of that Act, her Majesty, in the year 1876, added to her previous style and titles the title of “Empress of India.”

Vict. c. 56; 16 & 17 Vict. c. 107, ss. 327, 329; 17 & 18 Vict. c. 104, s. 108. And as to the governor-general and his council, and the age, qualifications and appointment of members of the civil or military service of the company, 5 & 6 Will. 4, c. 52; 16 & 17 Vict. cc. 95, 107; 17 & 18 Vict. c. 77. And the statutes relating to India passed *since* the 21 & 22 Vict. c. 106, comprise the following:—As to revenue, &c., 22 Vict. c. 11; 22 & 23 Vict. c. 39; 23 & 24 Vict. cc. 5, 102, 130; 24 & 25 Vict. cc. 3, 25, 118; 25 & 26 Vict. c. 7; 26 & 27 Vict. c. 73; 32 & 33 Vict. c. 106; 34 & 35 Vict. c. 29; 36 & 37 Vict. c. 32; 37 & 38 Vict. c. 3; 40 & 41 Vict. c. 51. As to loans to India, 44 & 45 Vict. c. 54; 45 & 46 Vict. c. 79; 48 & 49 Vict. cc. 28, 67; 56 & 57 Vict. c. 70. As to India stock, 44 & 45 Vict. c. 63; and unclaimed stock, 48 & 49 Vict. c. 25. As to the army and naval force, 23 & 24 Vict. c. 100; 29 & 30 Vict. c. 47; 31 & 32 Vict. c. 38; 37 & 38 Vict. c. 61; as to the

marines, 47 & 48 Vict. c. 38. As to the civil service, 24 & 25 Vict. c. 54; 33 & 34 Vict. c. 3. As to the council of the governor-general, and the government of the presidencies and provinces, &c., 24 & 25 Vict. c. 67; 28 & 29 Vict. c. 17; 32 & 33 Vict. cc. 97, 98; 33 & 34 Vict. c. 3; 34 & 35 Vict. c. 34; 37 & 38 Vict. c. 91; and (as to the Bombay and Madras armies) 56 & 57 Vict. c. 62. As to the courts of justice, &c., 24 & 25 Vict. c. 104; 28 & 29 Vict. c. 15; 34 & 35 Vict. c. 34; 37 & 38 Vict. c. 27. As to the “elder widows’ fund,” 36 & 37 Vict. c. 17; 41 & 42 Vict. c. 47. As to the “Bombay civil fund,” 45 & 46 Vict. c. 45; and see *Ex parte Pringle*, 39 Ch. Div. 300. As to the purchase of the Oude and Rohilkund Railway, and the construction of railways by contract, 51 & 52 Vict. c. 5; and as to the purchase of the South India Railway, see 53 & 54 Vict. c. 6; and as to Indian Railways (payment of interest during construction), see 57 & 58 Vict. c. 12.

[With regard to any *foreign* dominions which may happen in the course of events to belong to the person of the sovereign by hereditary descent, by purchase or other acquisition—as these do not in anywise appertain to the crown of these kingdoms, so they are entirely unconnected with the laws of England, and do not communicate with this nation in any respect whatsoever.]

SECTION V.

OF THE KINGDOM OF ENGLAND ITSELF.



[WE come now to consider the kingdom of England in particular, the immediate subject of those laws, which we are to treat of in these Commentaries; and the first point to observe is, that the high seas are, in one sense, part of the kingdom of England proper, for thereon the English courts of admiralty have jurisdiction, although they may not be subject to the common law strictly so called. The high seas begin at the low water-mark and extend outwards, a distinction being taken for certain limited purposes between the first three miles extending outwards from the low water-mark (*a*) and the sea beyond such three miles limit; and as regards the space between the high water-mark and the low water-mark, where the sea ebbs and flows, and which is commonly called the foreshore, the common law and the admiralty have alternate jurisdiction, the common law having jurisdiction on the land, and the admiralty on the water (*b*).

(*a*) Co. Litt. 260. As regards the extent of the admiralty jurisdiction in respect of offences committed by foreigners within three miles of the English coast, see *The Queen v. Keyn*, 2 Ex. D. 63; and 41 & 42 Vict. c. 73 (*The Territorial Waters Jurisdiction Act*, 1878). And as regards the regulation of the North Sea Fishing Trade, within the North Sea limits (*i. e.* outside territorial waters), and the regulation

of the liquor traffic there, see the *Sea Fisheries Act*, 1883 (46 & 47 Vict. c. 22); and the *North Sea Fisheries Act*, 1893 (repealing the corresponding Act of 1888, 51 & 52 Vict. c. 18); and as regards the protection of submarine telegraphs under extra-territorial waters, see 48 & 49 Vict. c. 49, and 50 Vict. c. 3.

(*b*) *Finch*, L. 78; *Constable's case*, 5 Rep. 107 a.

[All the territory of England is comprised in two divisions, the one of which is ecclesiastical, and the other civil (*c*).

I. The ecclesiastical division is, primarily, into two provinces, those of Canterbury and York. A province is the circuit of an archbishop's jurisdiction. Each province contains divers dioceses, or sees of suffragan bishops (*d*); and every diocese is divided into archdeaconries, each archdeaconry into rural deaneries, and every rural deanery into parishes (*e*).

A parish is that circuit of ground which is committed to the charge of one parson, or vicar, or other minister having cure of souls therein (*f*). How antient the division into parishes is, may at present be difficult to ascertain; for it seems to be agreed on all hands, that, in the early ages of Christianity in this island, parishes were unknown, or at least signified the same that a diocese does now (*g*). There was then no appropriation of ecclesiastical dues to any particular church; but every man was at liberty to contribute his tithes to whatever priest or church he pleased, provided only that he did it to some; or if he

(*c*) As to the territorial divisions of England, some valuable information will be found in the preface to the Population Abstract of 1831, vol. i. p. xiv.

(*d*) Bishops are here termed "suffragan" (a word signifying *deputy*) in relation to their archbishop (Co. Litt. by Harg. 94 a, note (3)). As to "suffragan bishops" in relation to the bishop of their diocese, vide post, bk. iv. pt. ii. c. i. It may be remarked that bishoprics or dioceses are almost as antient as the introduction of Christianity. Of those now extant, the greater number were formed in Saxon or in British times. (Report on Religious Worship, p. xxxvii.) See 35 & 36 Vict. c. 14, an Act for the alteration of the *boundaries* of

dioceses.

(*e*) Co. Litt. 94. The number of parishes and population of each diocese in 1831 are given in the Population Abstract of that year (vol. i. p. xix.).

(*f*) "*Parochia est locus in quo degit populus alicujus ecclesiæ.*"—5 Rep. 67 a, Jeffery's case. (See *Sharpley v. Overseers of Mapletorpe*, 3 Ell. & Bl. 906.) It is stated in the Population Abstract of 1831 (vol. i. p. xviii.) that the number of parishes and parochial chapelries at that period in England and Wales might, for any general purpose, be safely taken at 10,700.

(*g*) See Chitty's *Blackstone*, vol. i. p. 106, n.; and 3 Burn, Ec. L. 60, 7th ed.; Hall. *Mid. Ages*, vol. ii. p. 205, 7th ed.

[made no special appointment or appropriation thereof, they were paid into the hands of the bishop, whose duty it was to distribute them among the clergy, and for other pious purposes, according to his own discretion (*h*).

Mr. Camden says, that England was divided into parishes by Archbishop Honorius, about A.D. 636 (*i*). Sir Henry Hobart lays it down, that parishes were first erected by the council of Lateran, which was held A.D. 1179 (*k*). Each widely differing from the other, and both of them perhaps from the truth; which will probably be found in the medium between the two extremes. For Mr. Selden has clearly shown (*l*), that the clergy lived in common, without any division of parishes, long after the time mentioned by Camden. And it appears from the Saxon laws, that parishes were in being long before the date of that council of Lateran to which they are ascribed by Hobart.

We find the distinction of parishes, nay even of mother-churches, so early as in the laws of King Edgar, about the year 970. Before that time the consecration of tithes was in general *arbitrary*; that is, every man paid his own, (as was before observed,) to what church or parish he pleased. But this being liable to be attended with either fraud, or at least caprice, in the persons paying; and with either jealousies or mean compliances in such as were competitors for receiving them; it was ordered by a law of King Edgar, that “*dentur omnes decimæ primariæ ecclesiæ ad quam parochia pertinet*” (*m*). However, if any thane, or great lord, had a church, within his own demesnes, distinct from the mother-church, in the nature of a private chapel; then, provided such church had a ceme-

(*h*) Seld. of Tith. 9, 4; 2 Inst. 646; Slade *v.* Drake, Hob. 296. As to the modern law of tithes, see 6 & 7 Will. 4, c. 71, and 54 & 55 Vict. c. 8, et post, bk. iv. pt. II. c. III.

(*i*) See Camden's *Britannia*, vol. i. p. cccxxviii.

(*k*) Slade *v.* Drake, ubi sup. And see Bishop of Winchester's case, 2 Rep. 44 b.

(*l*) Seld. of Tithes, c. 9.

(*m*) C. 1.

[tery or consecrated place of burial belonging to it, he might allot one-third of his tithes for the maintenance of the officiating minister thereof : but if it had no cemetery, the thane must himself have maintained his chaplain by some other means ; for in such case *all* his tithes were ordained to be paid to the *primaria ecclesia* or mother-church (*n*).

This proves that the kingdom was then generally divided into parishes, which division happened probably not all at once, but by degrees. And it seems pretty clear and certain, that the boundaries of parishes were originally ascertained by those of manors ; since it very seldom happens that a manor extends itself over more parishes than one, though there are often many manors in one parish. The lords, as Christianity spread itself, began to build churches upon their own demesnes or wastes, to accommodate their tenants in one or two adjoining lordships ; and, in order to have divine service regularly performed therein, obliged all their tenants to appropriate their tithes to the maintenance of the one officiating minister, instead of leaving them at liberty to distribute them among the clergy of the diocese in general ; and this tract of land, the tithes whereof were so appropriated, formed a distinct parish,—which will well enough account for the frequent intermixture of parishes one with another ; for if a lord had a parcel of land detached from the main of his estate, but not sufficient to form a parish of itself, it was natural for him to endow his newly-erected church with the tithes of those disjointed lands.

Thus parishes were gradually formed, and parish churches endowed with the tithes that arose within the circuit assigned. But some lands, either because they were in the hands of irreligious and careless owners, or were situate in forest and desert places ; or because they

(*n*) C. 2. See also the Laws of King Canute, c. 11, about the year 1030.

[were the sites of royal palaces or of antient castles, were never united to any parish, but remained *extra-parochial*; and the sea-shore is *primâ facie* extra-parochial, as is also the bed of a public navigable river.] However, under the provisions of the 20 Vict. c. 19, 31 & 32 Vict. c. 122, 42 & 43 Vict. c. 54, and 56 & 57 Vict. c. 73, extra parochial places may (at least for certain purposes) be annexed to or grouped or amalgamated with the adjoining parish; and, on the other hand, army centres may (for limited purposes) be constituted new extra-parochial places. The tithes in all extra-parochial places are by immemorial custom payable to the king, in trust and confidence that he will distribute them for the general good of the church (*o*).

As a parish is an ecclesiastical division, so the persons who bear the chief authority in a parish, as such division, viz. the rector, (or vicar, or perpetual curate,) and the churchwardens, are also of an ecclesiastical character; and the nature of their offices and duties is a subject that consequently belongs not to the present part of this work, but to that division of it in which we shall have occasion to treat of the laws of the church (*p*). It is material, however, to observe, here, both as to parishes and parochial officers, that though primarily and properly they have relation to ecclesiastical purposes, yet there are some secular aspects in which they also require to be considered; for there has been a gradual tendency, more particularly in modern times, to treat a parish as a civil, not less than an ecclesiastical division. Thus, the collection of the poor-rate, or fund for the relief of the poor, and in a general point of view its application also, is *parochial*; and the case is the same with respect to several other species of local taxation (*q*). The affairs also of a parish, as such, used to be and (subject to the alterations made by the 56 & 57 Vict.

(*o*) 2 Inst. 647; Bishop of Winchester's case, 2 Rep. 44; Wright v. Wright, Cro. Eliz. 512.

(*p*) Vide post, bk. iv. pt. II.

(*q*) See 23 & 24 Vict. c. 51.

c. 73) still are regulated in a *vestry*; which is, properly speaking, an assembly of the minister, churchwardens, and parishioners,—that is, of such of the parishioners as contribute to the public burdens (*r*)—and which, from being commonly held in the “vestry” adjoining or belonging to the church, takes its name from thence; as the place itself does from the priest’s vestures, which are usually deposited there (*s*). The vestry is summoned, or called together, by the churchwardens, with the consent of the minister (*t*); who has been generally considered as entitled, when present, to preside at the meeting (*u*); and its principal duties used to be those of investigating and controlling the expenditure of the parochial funds, and of electing certain parochial officers (*v*). We here speak of the original character of the vestry at common law: but it is liable to modifications in particular places by force of special custom or enactment (*x*); and it was regulated besides by the general Vestry Act, commonly called Sturges Bourne’s Act (58 Geo. III. c. 69) (*y*),—amended by 59 Geo. III. c. 85, and by 16 & 17 Vict. c. 65; all which statutes have, however, been repealed by the 56 & 57 Vict. c. 73, so far as regards the parish meetings provided for by that Act, being the parish meetings in rural parishes exclusively; and the statutes referred to never, in fact, applied to London or Southwark, or to any parish created under the Church Building Acts for eccle-

(*r*) Steer’s Par. L. 253.

(*s*) By 13 & 14 Vict. c. 57, in any parish where the population exceeds 2,000, the Poor Law Board may, pursuant to a resolution of the vestry, make an order that no meeting shall be held in the parish church, except for divine worship or some like object or purpose approved by the bishop, nor in the vestry room attached to the church, except in cases of urgency and with the previous approval of the Poor

Law Board.

(*t*) Steer’s Par. L. 252.

(*u*) *Wilson v. Math*, 3 B. & Ald. 241, n. (*b*); see *Mawley v. Barbet*, 2 Esp. 687.

(*v*) Steer’s Par. L. 257; and see 58 Geo. 3, c. 69, s. 6; 1 & 2 Will. 4, c. 60, ss. 27, 39.

(*x*) Steer’s Par. L. 260; and see *R. v. Brain*, 3 B. & Adol. 614; *R. v. Clerkenwell*, 1 Ad. & Ell. 317.

(*y*) See *Reg. v. D’Oyly*, 12 A. & E. 139.

siastical purposes only, and not separately maintaining its own poor (z) ; but under these statutes, so far as they were and still continue operative, a vestry is not to be summoned except on three days' notice (a) ; and when it meets, a chairman is to be appointed, unless the rector, vicar, or perpetual curate, is present ; and the chairman has the casting-vote and signs the minutes of the proceedings ; and these statutes contain also provisions as to the right of voting, adjusted upon a certain scale, having relation to the amount in which the voter is assessed to the relief of the poor (b). The constitution of vestries was also, in some places, regulated by an Act, commonly called Sir J. Hobhouse's Act (1 & 2 Will. IV. c. 60 (c)), which provided for the election, by the ratepayers, of a certain number of vestrymen and auditors, under whose management the parochial accounts were to be kept and audited. Sir J. Hobhouse's Act was, however, repealed as to the metropolis (d) ; and it never applied to parishes not forming part of a city or town, and not having more than 800 ratepayers : and the adoption of its arrangements was in no case compulsory, no parish being subject to them unless it voluntarily consented to place itself under the Act ; and as regards all rural parishes, it has now been wholly repealed by the 56 & 57 Vict. c. 73, above mentioned. There is also a statute of 59 Geo. III. c. 12, which empowered parishes to establish vestries of a certain description for the management of the poor ; and as far as the relief of the poor was concerned, the bodies so appointed superseded the authority of the ordinary parish officers, but

(z) *The Queen v. Barrow*, Law Rep., 4 Q. B. 577.

(a) By 7 Will. 4 & 1 Vict. c. 45, the notice for calling a vestry is to be affixed on or near the church door, without any publication (as formerly) in the parish church.

(b) As to voters in arrear with their rates, see 16 & 17 Vict. c. 65 ;

and as to the manner of voting, see *R. v. Rector of Birmingham*, 7 Ad. & El. 254.

(c) *Reg. v. Hedger*, 12 A. & E. 157 ; *R. v. St. Pancras Trustees*, 5 Nev. & M. 219 ; *R. v. Vestry of St. Mary-le-bone*, 5 Ad. & El. 268.

(d) 18 & 19 Vict. c. 120, s. 1.

they were themselves made subject to the control of the Poor Law Board (*d*) ; but that statute also has been repealed by the 56 & 57 Vict. c. 73, so far as regards rural parishes. And here we will observe, that under the 13 & 14 Vict. c. 57, in any parish having a population which exceeds 2,000, the Poor Law Board may, pursuant to a resolution of the vestry, appoint a *paid vestry clerk* ; which clerk (in the case of a rural parish) becomes and acts as the clerk of the parish council established by the 56 & 57 Vict. c. 73 ; and under the 24 & 25 Vict. c. 125, and (for rural parishes) the 56 & 57 Vict. c. 73, fit offices for the transaction of the parish business may be provided.

On the subject of parishes it only remains to be observed that, by certain statutes lately passed for extending church accommodation, and making more effectual provision for the cure of souls (*e*),—it is provided that by such authorities and under such circumstances, and with such consents as therein specified, any part or parts of any parish may be constituted a separate *district* (*f*), for spiritual purposes ; and that any parish may also be divided into two or more distinct and separate parishes, for all ecclesiastical purposes whatsoever (*g*) ; and in pursuance of these provisions many such new constitutions and divisions have, for purposes of that description, accordingly taken place (*h*) ; and this principle of the constitution of separate

(*d*) See 4 & 5 Will. 4, c. 76, ss. 21, 54 ; 10 & 11 Vict. c. 109, s. 10 ; *Queen v. Green and others*, 21 L. J. (M. C.) 137.

(*e*) See also post, bk. iv. pt. II. c. iv.

(*f*) See 6 & 7 Vict. c. 37, s. 10 ; 7 & 8 Vict. c. 56, s. 6, as to the registration of a map or plan of the boundaries of districts formed under these Acts.

(*g*) Some of the Acts also authorized the establishment of *select vestries* for ecclesiastical purposes

(see 59 Geo. 3, c. 134, s. 30 ; 3 Geo. 4, c. 72, s. 10) ; but these vestries were abolished by 14 & 15 Vict. c. 97, s. 23.

(*h*) With respect to parishes, see also 2 & 3 Vict. c. 62, ss. 34—36 ; 3 & 4 Vict. c. 15, s. 28 ; 8 & 9 Vict. c. 118, s. 39 ; and 12 & 13 Vict. c. 83, providing that the antient boundaries between parishes and townships may be adjusted, or new boundaries defined (see *R. v. Madeley*, 15 Q. B. 43) ; also the stat. 5 & 6 Vict. c. 18, authorizing the sale

parishes has been adopted and applied, by the 56 & 57 Vict. c. 73, for the purposes of that Act,—the portion of a parish which is within a rural sanitary district and the portion of it which is outside such district (when any parish happens to be so situated) being, each of them, made a separate parish as if they had been so constituted under the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61). And thus much for the ecclesiastical division of the territory of England.

II. [The civil division of the territory of England is into counties, of those counties into hundreds, and of those hundreds into tithings or towns. This division is of remote and undefined antiquity; and was not peculiar to England, similar distributions having been in use among several nations of the continent (*i*). As to the tithings, they were so called, from the Saxon, because *ten* freeholders with their families composed one. These all dwelt together, and were sureties or free pledges to the king, for the good behaviour of each other; and if any offence was committed in their district, they were bound to have the offender forthcoming (*k*). And therefore antiently no man was suffered to abide in England, above forty days, unless he were enrolled in some tithing or decennary (*l*). One of the principal inhabitants of the

of parish property and the payment of parish debts out of the poor rate;—the 19 & 20 Vict. c. 50, enabling parishioners, &c., to sell advowsons held by or in trust for them; the 23 & 24 Vict. c. 30, enabling two-thirds of the rate-payers of a parish to make rates for maintaining public walks, &c. therein; and the 45 & 46 Vict. c. 15, providing for the application of the compensation paid to parishes on the extinction of their rights of common,—all which seve-

ral matters are also provided for by the 56 & 57 Vict. c. 73, as regards the rural parishes within the purview of that Act. Vide post, bk. iv. pt. III. c. I.

(*i*) The division has been ascribed to Alfred, but Mr. Hallam questions his claim to the distinction, and observes that counties are mentioned in the Laws of Ina. (See Hallam's Middle Ages, vol. ii. pp. 389, 402.)

(*k*) Flet. 1, 47.

(*l*) Mirr. c. 1, s. 3.

[tithing was annually appointed to preside over the rest, being called the tithing man, the headborough, (words which speak their own etymology,) and in some counties, the borsholder, or borough's-ealder, being supposed the discreetest man in the borough, town, or tithing (*m*).

Tithings, towns, or vills, are of the same signification in law; and are said to have had each of them originally a church with the celebration of divine service, sacraments and burials: though that seems to be rather an ecclesiastical than a civil distinction (*n*). The word *town* (*o*) or *vill* is indeed, by the alteration of times and language, now become a generical term, comprehending under it several species and varieties.] Taken in this sense, towns are distinguished from each other as being either corporate or not corporate; the townsmen forming, in the first kind, a *corporation*, that is, a society, with certain legal properties and capacities, on the nature of which we shall treat at large in a subsequent division of these Commentaries; and shall at the same time consider the provisions of the Act for regulating municipal corporations (45 & 46 Vict. c. 50), by the effect of which, all towns of this description are now placed under one uniform plan of internal government (*p*). There are also market-towns, that is, towns which are entitled to hold markets; and there are others which have not that franchise. And, lastly, towns are divided into cities, boroughs, and common towns. The cities of this kingdom either are or have been sees of bishops; yet there is no necessary connection between a city and a see (*q*); and though the bishopric be dissolved, yet still the town remaineth a city (*r*). A

(*m*) Jact. Dict. v. Headborough.

(*n*) Co. Litt. 115 b.

(*o*) As to the legal meaning of the word "town," see Elliott v. South Devon Railway Company, 2 Exch. 729; Ex parte Incumbent, &c. of Brompton, 22 L. J., N. S. (Ch.) 281; London and South

Western Railway Company v. Blackmore, Law Rep., 4 H. of L. 611.

(*p*) As to municipal corporations, vide post, bk. iv. pt. iii. c. i.

(*q*) See 1 Woodd. 302; Jact. Dict. in tit. City.

(*r*) Co. Lit. 109 b. The town

borough is a town that sends (or hath sent) burgesses to parliament (*s*), a privilege the nature of which we shall explain in that part of the work which relates to Parliament (*t*). According to Sir Edward Coke, there were in his time, in England and Wales, 8,803 towns, or thereabouts (*u*). [To several of them there are small appendages belonging, called hamlets; which are taken notice of in the Statute of Exeter (14 Edw. I.), wherein frequent mention is made of “entire vills,” “demi-vills,” and “hamlets.” Entire vills, Sir Henry Spelman conjectures, to have consisted of ten freemen or frank-pledges, demi-vills of five, and hamlets of less than five (*x*). These little collections of houses are sometimes under the same administration as the town itself, sometimes governed by separate officers; in which last case they are, for some purposes in law, looked upon as distinct townships. These towns, as was before hinted, contained each originally but one parish

of *Westminster* was made a city by Hen. VIII. when he made it the seat of one of the new bishoprics founded out of the revenues of the dissolved monasteries; it was restored to the diocese of London in the reign of Edw. VI.; and Elizabeth turned Westminster into a collegiate church, subject to a dean. See Chitty's Black. vol. 1, p. 109 *n*.; 2 Burn, Ecc. Law, 542, 7th ed.; Co. Litt. by Harg. 109 b, n. (3). The 51 & 52 Vict. c. 11 (called the Westminster Abbey Act, 1887), contains provisions for the transfer of the property of the Dean and Chapter to the Ecclesiastical Commissioners, and for the future more efficient maintenance of the fabric of the Abbey.

(*s*) 1 Bl. Com. 114; Litt. s. 164; Co. Litt. 108 b, 109 a. In the Municipal Corporations Act, 45 & 46 Vict. c. 50, a “borough” is

“any city or town to which the Act applies.” In 31 & 32 Vict. c. 41 (The Borough Electors Act, 1868), the term “parliamentary borough” meant a borough which prior to the Representation of the People Act, 1867, returned a member or members to parliament; and a “municipal borough,” a place subject to the provisions of 5 & 6 Will. 4, c. 76; and these definitions are accepted in the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), and as so accepted are adopted in the Representation of the People Act, 1884 (48 Vict. c. 3), and in the Redistribution of Seats Act, 1885 (48 & 49 Vict. c. 23).

(*t*) As to the Parliament, vide post, bk. iv. pt. i. c. i.

(*u*) Co. Litt. 116 a.

(*x*) Gloss. 274.

[and one tithing ; though many of them now, by the increase of inhabitants, are divided into several parishes and tithings ; and, sometimes, where there is but one parish, there are two or more villis or tithings.

As ten families of freeholders made up a town or tithing, so ten tithings composed a superior division, called a hundred, as consisting of ten times ten families. The hundred is governed by a high constable or bailiff (*y*) ; and formerly there was regularly held in it the hundred court for the trial of causes, though now fallen into disuse (*z*). In some of the more northern counties these hundreds are called wapentakes (*a*).

An indefinite number of these hundreds make up a county or shire. Shire is a Saxon word signifying a division ; but a county, *comitatus*, is plainly derived from *comes*, the count of the Franks ; that is, the earl or alderman, (as the Saxons called him,) of a shire, to whom the government of it was entrusted. This he usually exercised by his deputy, still called in Latin *vice-comes*, and in English, the sheriff, shrieve, or shire-reeve, signifying the officer of the shire ; upon whom, by process of time, the civil administration totally devolved. In some counties there is an intermediate division between the shire and

(*y*) As to high constables, however, see 32 & 33 Vict. c. 47. Blackstone says (vol. i. p. 115), that the division of *hundreds* obtained formerly in Denmark and in France ; and he adds, that in France the division was instituted by Clotharius and Childebert, with a view to obliging each district to answer for the robberies committed within its own boundaries ; and in our own country the *hundred* is, or was, answerable for the riotous demolition of churches, buildings, and machinery, and for plunder of wreck ; and now, under the 49 &

50 Vict. c. 38, the compensation for damage to buildings or other property occasioned by riots is payable out of the police rate ; and (by 51 & 52 Vict. c. 41, s. 3) the County Council is made the local authority for the execution of the Act.

(*z*) As to the hundred court, vide post, bk. v. c. iv.

(*a*) Seld. in Fortes. c. 24 ; Wilk. Leg. Ang.-Sax. Ll. Edw. c. 33 ; Christian's Blackstone, vol. i. p. 115, *note* ; Cowell's Dict. v. Wapentake.

[the hundreds, as lathes in Kent, and rapes in Sussex (*b*); each of them containing about three or four hundreds a-piece (*c*). These had formerly their lathe-reeves and rape-reeves, acting in subordination to the shire-reeve. Where a county is divided into *three* of these intermediate jurisdictions, they are called trithings, which were antiently governed by a trithing-reeve (*d*). These trithings still subsist in the large county of York, where by an easy corruption they are denominated ridings; the north, the east, and the west riding. The number of counties in England and Wales have been different at different times; at present they are forty in England and twelve in Wales (*e*).]

It seems probable that the realm was originally divided into counties, with a view to the convenient administration of justice; for the judicial business of the kingdom was in early times chiefly dispatched in local courts, held in each different county, before the sheriff, as its principal officer (*f*). But these courts of the sheriff retain at the present day nothing of their former consequence; having fallen into disuse, and their places being now supplied by the modern county courts, which also have reference to the old territorial division, there being for each county one of

(*b*) The rapes of Sussex are said to have been military governments in the time of the Conqueror; the lathes of Kent to have been civil jurisdictions, and of earlier date.—(Population Abstracts, 1831, vol. i. p. xv.)

(*c*) For some purposes connected chiefly with magisterial business, certain counties are severed into *divisions* (see 10 Geo. 4, c. 46; 6 & 7 Will. 4, c. 12; 22 & 23 Vict. c. 65; and 28 & 29 Vict. c. 37), a principle adopted for general purposes in the Local Government Act, 1888 (51 & 52 Vict. c. 41).

(*d*) Wilk. Leg. Ang.-Sax. Ll.

Edw. c. 34.

(*e*) A particular place, parcel of one county, is sometimes detached from it, and surrounded by (*i.e.*, situate in) another. By 7 & 8 Vict. c. 61, these detached parts were annexed, for all purposes, to the counties of which, for the purpose of parliamentary representation, they formed a part. Liberties situate within counties may also, by order in council under the 13 & 14 Vict. c. 105, be united with the counties within which they are situate.

(*f*) Hickes, Thes. Diss. Epist.; Reeves's Hist. Eng. L. vol. i. pp. 6, 7.

these courts held in one or more places within its limits. Also, as regards crime (*g*), the trial is, as the general rule, conducted in the county wherein the offence is alleged to have been committed; and such trials take place either before the judges and commissioners of assize, on their periodical circuits; or else before the justices of the peace for the county at their quarter sessions. Another important object connected with the distribution into counties, is that of parliamentary representation, inasmuch as every county used to send to the House of Commons its own members, called knights of the shire,—who represented their respective counties, as the borough members do their respective towns; though, latterly, the larger counties were subdivided, each portion forming a separate county (so far as this purpose was concerned), and sending its separate representative (*h*); and this subdivision of counties has been recently carried to a great length, and boroughs also have been sub-divided, by the Redistribution of Seats Act, 1885 (48 & 49 Vict. c. 23). For the object of local taxation, too, the division into counties is of practical effect and importance; for as each parish is subject to a rate for the relief of the poor, so is every county subject to a county rate, which is levied on the occupiers of land within the county under the authority of various acts of parliament (*i*), and applied to many miscellaneous pur-

(*g*) Formerly, actions in the superior courts, when of a local character, were tried in the county in which the cause of action arose, —the venue being local; but there is now no local venue in such cases. (Orders and Rules of 1883, Order xxxvi.) Also, by 4 & 5 Will. 4, c. 36, a court called the “Central Criminal Court,” having its sittings in London, was established for the trial of offences committed in London, Middlesex, and some parts of Essex, Kent, and Surrey; and by 19 & 20 Vict. c. 16, persons

charged with offences committed elsewhere might be ordered to be tried in that court. Also, by the Mutiny Acts, persons subject to those acts may be tried in any place where they may be found. See also the 39 & 40 Vict. c. 57, extended by 40 & 41 Vict. c. 46; and 42 & 43 Vict. c. 1, uniting counties together for the purpose of trying prisoners.

(*h*) 2 & 3 Will. 4, c. 45, ss. 12, 13, 14, and see 24 & 25 Vict. c. 112, ss. 1, 7.

(*i*) See 22 Hen. 8, c. 5; 12 Geo. 2,

poses (*k*). But all these civil divisions into counties, parishes, hundreds, and the like, became for many purposes obsolete, more or less, under the provisions of the Local Government Act, 1888 (51 & 52 Vict. c. 41), and they are likely to become of still less and less importance as civil divisions, so soon as the Rural Parishes Act (56 & 57 Vict. c. 73), has come into effective operation, as will be more fully shown in the Third Part of the Fourth Book of these Commentaries, wherein we treat of the Social Economy of the Realm, and thereunder of the laws regulative of corporations.

[Three counties, viz. Chester, Durham, and Lancaster, are counties *palatine*. The two former are such by prescription or immemorial custom, or at least are as old as the Norman conquest (*l*); the latter was created a county palatine by King Edward the third, in favour of Henry Plantagenet, first Earl and afterwards Duke of Lancaster (*m*): whose heiress being married to John of Gaunt, the king's son, the franchise was greatly enlarged and confirmed in parliament, to honour John of Gaunt himself (*n*); whom, on the death of his father-in-law, the king had also created Duke of Lancaster (*o*). Counties palatine are so called a palatio, because the owners thereof, the Earl of Chester, the Bishop of Durham, and the Duke of Lancaster, had formerly in those counties *jura*

c. 29; 55 Geo. 3, c. 51; and (as to the assessment and collection of the county rate) 7 & 8 Vict. c. 33; 15 & 16 Vict. c. 81; 21 & 22 Vict. c. 33; 29 & 30 Vict. c. 78; and *East Looe v. Cornwall*, 3 Best & Smith, 20; and (as to borough rates in the nature of county rates) 5 & 6 Will. 4, c. 76, s. 92; 17 & 18 Vict. c. 71.

(*k*) Among the purposes to which the county rate is applied, are the maintenance of the rural police, lunatic asylums, gaols, and bridges.

As to borrowing money for county purposes, see 35 & 36 Vict. c. 7, and 38 & 39 Vict. c. 83; and (as to the county of Middlesex) 8 & 9 Vict. c. 32; also, generally, 51 & 52 Vict. c. 41, and 53 & 57 Vict. c. 73.

(*l*) Seld. Tit. Hon. 2, 5, 8.

(*m*) Pat. Rot. 25 Edw. 3, p. 1, m. 18; Seld. ubi sup.; Sandford's Gen. Hist. 112; 4 Inst. 204.

(*n*) Cart. Rot. 36 Edw. 3, m. 9.

(*o*) Pat. Rot. 51 Edw. 3, m. 33; Case of Duchy of Lancaster, Plowd. 215; 7 Rym. 138.

[*regalia* as fully as the king in his palace; *regalem potestatem in omnibus*, as Bracton expresses it (*p*). They might pardon treasons, murders, and felonies; they appointed judges and justices of the peace; all writs and indictments ran in their names, as in other counties in the king's; and all offences were said to be done against their peace, and not, as in other places, *contra pacem domini regis* (*q*). As to which indeed it may be remarked that by the antient law, in all peculiar jurisdictions, offences were said to be done against his peace in whose court they were tried: in a court leet, *contra pacem domini*; in the court of a corporation, *contra pacem ballivorum*; in the sheriff's court or tourn, *contra pacem vice-comitis* (*r*). These palatine privileges, so similar to the independent regal jurisdictions usurped by the great barons on the continent during the weak and infant state of the first feudal kingdoms in Europe (*s*), were in all probability originally granted to the counties of Chester and Durham, because they bordered upon inimical countries, Wales and Scotland; in order that the inhabitants, having justice administered at home, might not be obliged to go out of the county, and leave it open to the enemy's incursions; and that the owners, being encouraged by so large an authority, might be the more watchful in its defence. And upon this account also there were formerly two other counties palatine, Pembrokeshire and Hexhamshire (the latter now united with Northumberland), but these were abolished by parliament; the former in the twenty-seventh year of Henry the eighth, the latter in the fourteenth year of Elizabeth. In the twenty-seventh year of Henry the eighth, moreover, the powers before mentioned of owners of counties palatine were abridged; the reason for their continuance having in a manner ceased (*t*).] And in

(*p*) L. 3, c. 8, s. 4.

(*q*) 4 Inst. 205.

(*r*) Seld. in Heng. Magn. c. 2.

(*s*) See Robertson, Cha. V. i. 60.

(*t*) Inst. ubi sup.

modern times, alterations have taken place in regard to the administration of justice in the counties palatine, which have assimilated them in that matter to the rest of England. Thus by 11 Geo. IV. & 1 Will. IV. c. 70, the jurisdiction of the court of session of the county palatine of Chester was abolished, and that county was subjected in all things to the jurisdiction of the superior courts at Westminster; and by the Judicature Act, 1873, the jurisdictions of the Court of Common Pleas of Lancaster and of the Court of Pleas of Durham were transferred to the High Court of Justice by that Act established (*u*).

It is also to be remarked, that of the counties palatine none of them now remain in the hands of a subject. For the earldom of Chester, as Camden testifies, was united to the crown by Henry the third, and has ever since been one of the titles of the sovereign's eldest son (*x*); and the palatine jurisdiction of Durham, which was long vested in the Bishop of Durham for the time being, was taken from him by 6 & 7 Will. IV. c. 19 (amended by 21 & 22 Vict. c. 45), and vested as a separate franchise and royalty in the crown. [As to the county palatine or duchy of Lancaster, it was the property of Henry Bolingbroke, the son of John of Gaunt, at the time when he wrested the crown from King Richard the second, and assumed the title of Henry the fourth. But he was too prudent to suffer his duchy to be united to the crown; lest if he lost the one he should lose the other also. For as Plowden (*y*) and Sir Edward Coke (*z*) observe, "he knew he had the duchy of "Lancaster by sure and indefeasible title, but that his

(*u*) 36 & 37 Vict. c. 63, s. 16. As to the *chancery* court of the county palatine of Lancaster, see 13 & 14 Vict. c. 43; and 21 & 22 Vict. c. 27. And as to the *chancery* court of the county palatine of Durham, see 52 & 53 Vict. c. 47;

and as to both courts see vol. iii. book v. chap. v.

(*x*) Camden's *Britannia*, vol. iii. p. 46.

(*y*) P. 215.

(*z*) 4 Inst. 205.

[“title to the crown was not so assured: for that after the “decease of Richard the second, the right of the crown was “in the heir of Lionel Duke of Clarence, *second* son of “Edward the third; John of Gaunt, father to this Henry “the fourth, being but the *fourth* son.” And therefore he procured an Act of Parliament, in the first year of his reign, ordaining that the duchy of Lancaster, and all other his hereditary estates, with all their royalties and franchises, should remain to him and his heirs for ever; and should remain, descend, be administered and governed in like manner as if he never had attained the regal dignity; and thus they descended to his son and grandson, Henry the fifth and Henry the sixth: many new territories and privileges being annexed to the duchy by the former (*a*). Henry the sixth being attainted in the first year of Edward the fourth, this duchy was declared in parliament to have become forfeited to the crown (*b*); and at the same time an Act was made to incorporate the duchy of Lancaster, to continue the county palatine—which might otherwise have determined by the attainder (*c*),—and to make the same parcel of the duchy: and, further, to vest the whole in King Edward the fourth and his heirs, *kings of England*, for ever; but under a separate guiding and governance from the other inheritances of the crown. And in the first year of Henry the seventh, another Act was made to resume such part of the duchy lands as had been dismembered from it in the reign of Edward the fourth; and to vest the inheritance of the whole in the king and his heirs for ever, as amply and largely, and in like manner, form, and condition, separate from the crown of England and the possessions of the same, as the three Henrys and Edward the fourth, or any of them, had and held the same (*d*).]

(*a*) Parl. 2 Hen. 5, m. 50; 3 Hen. 5, m. 15.

(*b*) Fisher v. Batten, 1 Ventr. 155.

(*c*) 1 Ventr. 1157.

(*d*) As to the effect of this Act, see Plowd. 220, 1, 2; Lamb. Archæion, 233; 4 Inst. 206. We may

With regard to the Isle of Ely, we may observe that this was never a county palatine, though sometimes erroneously called so. It was, however, a royal franchise; the Bishop of Ely having been formerly entitled, by grant of King Henry the first, to *jura regalia* within the district, whereby he exercised a jurisdiction over all causes as well criminal as civil (*e*). But by 6 & 7 Will. IV. c. 87 (amended by 7 Will. IV. & 1 Vict. c. 53), this secular authority of the bishop was taken away and vested in the crown.

[There are also counties *corporate*—otherwise called *counties of cities or towns*—which are certain cities and towns, some with more, some with less territory annexed, to which out of special grace and favour the kings of England have granted the privilege to be counties of themselves and not to be comprised in any other county; but to be governed by their own sheriffs and other magistrates (*f*), so that no officers of the county at large have any power to intermeddle therein (*g*).] As counties corporate constitute no part of the counties in which they are locally situate, so they had formerly, in general, no share in voting for the members to serve for those counties in parliament. However, thirteen of the number were latterly included within their respective counties, so far as regards the right of election for knights of the shire (*h*); and this practice has been largely adopted in the Redistribution of Seats Act, 1885 (48 & 49 Vict. c. 23), and also in the Local Government Act, 1888 (51 & 52 Vict. c. 41). And we may add, that by 38 Geo. III. c. 52, all offences

notice here that by 18 & 19 Vict. c. 58, the chancellor and council of the Duchy of Lancaster are enabled to sell and purchase land, and by 57 & 58 Vict. c. 46, to enfranchise land, on behalf of her Majesty in right of the Duchy.

(*e*) 4 Inst. 220; see Grant *v*.

Bagge, 3 East, 128.

(*f*) As to sheriffs of counties corporate, see 5 & 6 Will. 4, c. 76, s. 61; and 6 & 7 Will. 4, c. 105, s. 5; and now 45 & 46 Vict. c. 50.

(*g*) See 3 Geo. 1, c. 15; 5 & 6 Will. 4, c. 76, ss. 61, 109.

(*h*) 2 & 3 Will. 4, c. 45, s. 17.

committed in a county corporate may be tried in the next adjoining county at large (*i*); a regulation from which certain towns and cities indeed were at first excepted, but almost the whole of these exceptions were repealed by the Act of 1835, for regulating municipal corporations (*k*),—a repeal which is continued by the Municipal Corporations Act, 1882.

Thus much of the countries subject to the laws of England; the consideration of which involves, in a general point of view, that of the *persons* also, to whom these laws are applicable. For it is to be observed that all persons found within these territories fall under the operation of these laws, though in different degrees: British subjects—that is, persons born within any part of the dominions of the crown, (and in some cases their descendants also, though born in foreign parts,) and persons naturalized by Act of Parliament—being in a full and absolute sense entitled to the rights conferred by these laws, and liable to the obligations they impose; but aliens (or those who are not British subjects) in a limited sense only, as we shall have occasion more particularly to explain hereafter (*l*).

(*i*) See also 14 & 15 Vict. c. 55, ss. 19, 21—24; and c. 100, s. 23.

(*k*) 5 & 6 Will. 4, c. 76, s. 109. Other provisions as to *counties corporate* not requiring specific notice in the text are contained in 51 Geo. 3, c. 100; 60 Geo. 3 & 1 Geo. 4, c. 4, s. 6; 7 Geo. 4, c. 64, s. 25; 9 Geo. 4, c. 61; 5 & 6 Will. 4, c. 76, s. 113; 2 & 3 Vict. c. 72; 17 & 18 Vict. c. 35; and see also the Muni-

cipal Corporations Act, 1882 (45 & 46 Vict. c. 50).

(*l*) See 33 & 34 Vict. c. 14, an Act passed to amend in certain points the law relating to the legal condition both of aliens and of British subjects. Of this statute we shall have occasion to speak further in our second volume, where some account is given of the legal position of aliens in this country.

NEW COMMENTARIES
ON
THE LAWS OF ENGLAND.

BOOK I.

OF PERSONAL RIGHTS.

IN a disquisition of such extent and variety as that on which we are now about to enter, it is obviously of the first importance to lay down a proper preliminary arrangement of the subject; and the plan of division which appears to be most suitable to a treatise of this description, is one founded on a consideration of the nature of municipal law in the abstract, and of the objects or purposes towards which it is directed. It will be necessary, therefore, to recur for a moment to the views taken of this subject in a preceding part of the work.

We have seen that municipal law is a rule of civil conduct prescribed by the supreme power in a state; whose authority to prescribe it, has been referred to the contract implied in civil society, that its members should submit to certain restraints of their natural freedom, in order to secure to each other the enjoyment of defined liberties and advantages; and these we have comprehended under the general name of rights. It results from these considerations, that in every country the true and proper objects of the law consist in the establishment and maintenance of the *rights* severally due to the different members of the community.

The idea of rights, however, naturally suggests the correlative one of *wrongs*; for every right is capable of being violated. A right to receive payment for goods sold (for example) implies a wrong on the part of him who owes, but withholds, the price; and a right to live in personal security implies a wrong on the part of him who commits personal violence. And, therefore, while in a general point of view the law is intended for the establishment and maintenance of rights, we find it on closer examination to be dealing both with rights and wrongs. It first fixes the character and definition of rights, and then, with a view to their effectual security, proceeds to define wrongs, and to devise the means by which the latter shall be prevented or redressed.

These considerations form the most convenient basis upon which to construct the principal division of the laws of England; and we shall therefore sever them (like former writers) into two portions, one of which regards *Rights*, and the other *Wrongs* (a).

Now, when rights are analyzed, they are found to consist of several kinds. For, first, rights are such as regard a man's own person; secondly, they are such as regard his dominion over the external and sensible things by which he is surrounded; thirdly, they are such as regard his private relations, as a member of a family; fourthly, they are such as regard his social state or condition as a member of the community; the first of which classes of rights may be designated as *personal rights*, the second, as *rights of property*, the third, as *rights in private relations*, and the fourth, as *public rights*.

In these divisions of rights, it is to be observed, that we everywhere mean to include the converse or reciprocal consideration of *duties*. For whatever is due *to* one man, or to one set of men, is necessarily due *from* another. Thus

(a) See the Preface to Hale's *Analysis of the Laws of England*; also, *Bl. Com.* vol. i. p. 122.

the right of one man to receive from another the price of a commodity sold, casts upon the latter the duty of paying that price; and the general right of each individual to live in personal security, implies the converse duty on the part of others not to subject him to any violence. The party, too, who possesses the right, is in general himself subject to some resulting duty. Thus the people have a right to live under the form of government established by law, and are under a corresponding duty of submission to that government. In the discussion of rights, therefore, it is often necessary to speak also of duties. Indeed, it is under the aspect of duties principally, that some rights require to be considered.

To avoid, however, a misapprehension which might arise from the use of the term “duties,” we must remark that there are certain duties which are wholly unconnected with rights as above defined, or which are not correlative to any such rights; and accordingly of such duties our law takes no notice. These are, *e.g.* such as the law of God or our own conscience prescribes, and the violation of which by the individual is unattended with direct mischief to others. Thus, while on the one hand public sobriety is a duty recognized by the law, and is correlative to the right of others to be protected from contaminating and hurtful exhibitions of vice, private sobriety on the other hand is not a duty recognized by the law, and is not enforced by any legal sanctions; because secret intoxication, though equally opposed, with open drunkenness, to the law of God and to conscience, is no violation of any correlative right in others, and is not a fit subject for civil punishments.

Wrongs also may be subdivided; but as regards these we are necessarily led to adopt a different principle of distribution. For the leading distinction here depends not on the character of the right violated, but on the party who is supposed to sustain injury from its violation. According to the view which our law takes of this subject, the violation of a right may in some instances amount to

an injury to the particular individual only, but in others it may take the character of an injury to the public at large (*b*). When viewed in the first aspect, it is usually called a *civil injury*, when in the last, a *crime*. Thus the withholding of a debt, is a wrong to the individual, and consequently a civil injury; but it is considered as not affecting the public, and therefore it is no crime. On the other hand, to deprive a man of his money by theft or robbery, is held to be a wrong to the public, and therefore a crime; though it is also a civil injury if considered in relation to the damage which the party individually sustains. The considerations which tend to determine whether a given species of wrong shall be treated as an injury to the individual, or as an injury to the public, constitute a subject upon which it would be premature to enter in this place, and which belongs to a later portion of the treatise. It is sufficient at present to have thus stated the general nature of the distinction between civil injuries and crimes, and to remark that it is one of great practical importance; for the law deals very differently with the two kinds of wrong; the former being merely a subject for *redress*, the latter for *punishment*.

The extensive subject under consideration appearing thus naturally to resolve itself into the several divisions above indicated, we shall adopt them for the purpose of the present work; and our method, or order of discussion, will be as follows:—

Book I. Of Personal Rights.

II. Of Rights of Property.

III. Of Rights in Private Relations.

IV. Of Public Rights.

V. Of Civil Injuries; including also the modes of Redress which the law provides for them.

VI. Of Crimes; comprising also the modes of Criminal Prosecution.

(*b*) See 4 Bl. Com. pp. 5, 6.

1. Personal safety and freedom.
2. Society and control of one's family dependents.
3. Reputation
4. Advantages open to the community generally such as the free exercise of calling
5. to possession and ownership.
6. to immunity from fraud and damage.

We are now first to consider Personal Rights, or those which relate to a man's own person. As these are the most important, so are they also the most simple of all the rights secured to men by the institutions of society; and the discussion of these rights will consequently lie in a comparatively narrow compass. They consist of two principal or primary articles, the right of *Personal Security*, and the right of *Personal Liberty*.

I. The right of Personal Security consists in a person's legal and uninterrupted enjoyment of his life and limbs; and of his body, health, and reputation.

1. [Life is the immediate gift of God, a right inherent by nature in every individual; and it begins, in contemplation of law, as soon as an infant is able to stir in the womb (*c*): indeed an infant *en ventre sa mère* is supposed to be already born for many purposes (*d*). And if a woman is quick with child, and by a potion or otherwise designedly killeth it in her womb; or if any one beat her, with a like design, whereby the child dieth in her womb, and she is delivered of a dead child; this, though not murder, was by the antient law considered manslaughter (*e*).] But although, by the modern law, the offence is no longer homicide in either case, still to procure a miscarriage is, in all cases, a heinous crime: and if means be used, with intent to kill a child in the womb,

(*c*) The rule of the civil law is the same. (Ff. 1, 5, 26.)

(*d*) For example, such infant may take an estate as legatee, or by descent, or under the limitations of a deed; and it may also have assigned to it a guardian. (See *Pearce v. Carrington*, Law Rep., 8 Ch. App. 969; *Occleston v. Fullalove*, ib., 9 Ch. App. 147.) In case of *descent*, however, the presumptive heir may enter and

receive the profits for his own use till the birth of the child. (See Bl. Com. vol. 1, p. 130; Co. Litt. 390 a; 12 Car. 2, c. 24, s. 8; 10 Will. 3, c. 22; *Beale v. Beale*, 1 P. Wms. 245; *Doe v. Clark*, 2 H. Bl. 399; *Wallis v. Hodson*, 2 Atk. 117; *Doe v. Lancashire*, 5 T. R. 49; *Goodtitle v. Newman*, 3 Wils. 526.)

(*e*) Bracton, l. 3, c. 4.

and the child is *born alive*, and afterwards dies by reason of the means so used, the case amounts to murder (*f*).

A man's limbs—by which we here intend those members which may be useful to him in fight—are also the gift of the wise Creator, to enable him to protect himself from external injuries in a state of nature; and the deprivation of a man thereof is *mayhem* by the common law. To his limbs, therefore, as to life itself, a man has a natural inherent right, and which right draws after it certain legal consequences to which we shall now advert.

[A man's life and his limbs are held of such high value in the law, that even homicide is pardonable, if committed *se defendendo*, or in order to preserve them; and, whatever a man does to save either life or member, is looked upon as done upon the highest necessity and compulsion. Therefore, if a man through fear of death or mayhem is, *e. g.*, prevailed upon to execute a deed, or to do any other legal act, such deed or act, although accompanied with all the requisite solemnities, may be afterwards avoided by him, on the ground of duress to life or limb, having been in fact forced upon him by a well-grounded apprehension of losing life or limb in case of non-compliance (*g*). And such an apprehension is also a sufficient excuse in law for the commission of many misdemeanors, as will appear in the course of these Commentaries (*h*). This species of *duress* (so called from the Latin *durities*), is of two sorts, either first, duress of imprisonment, as where a man actually loses his liberty, or duress *per minas*, as where the hardship is only threatened and impending; the duress in each case being duress to the person, as opposed to duress to or through a man's goods; and with the latter species of duress we are not at present concerned. Duress *per minas* is either fear of death (*i. e.*, loss of life), or else fear of mayhem (*i. e.*, loss of limb). But this fear must be

(*f*) 3 Inst. 50.

(*h*) Vide post, bk. vi.

(*g*) 2 Inst. 483.

[upon sufficient reason; that is (as Bracton expresses it), "*non suspicio cujuslibet vani et meticulosi hominis, sed talis qui possit cadere etiam in virum constantem; talis enim debet esse metus, qui in se contineat vitæ periculum, aut corporis cruciatum*" (i). Therefore, the mere fear of a battery or of being beaten, however well grounded, is not duress to the person; as neither is the fear of having one's house burned, or one's goods taken away and destroyed; because in all these cases, should the threat be performed, a man may have satisfaction by recovering the equivalent damages; but no suitable recompense can be made for the loss of life or limb (k).

The law not only regards life and protects every man in the enjoyment of it, but also furnishes him with everything necessary for its support. For there is no man so indigent or wretched, but he may demand a supply sufficient for all the necessities of life from the more opulent part of the community, by means of the statutes enacted for the relief of the poor, of which in their proper place (l).]

These rights of life and limb can only be determined by the death of the person; which is either a civil or a natural death (m). Civil death occurs where a man is outlawed or attainted; for he loses thereupon (subject to some exceptions) his civil rights and capacities, and becomes, as it were, dead in law (n). It also took place, formerly, where any man, by the process of the common law, took sanctuary and abjured the realm (o); or entered into religion, that is, went into a monastery, and became there a monk professed: in both of which cases he was absolutely dead in law, and his next heir had his estate. [For such abjured

(i) Bract. l. 2, c. 5; Co. Litt. 162 a, 253 b; see R. v. Southerton, 6 East, 144.

(k) 2 Inst. 483. Blackstone (vol. i. p. 131) remarks that the doctrine of the civil law with regard to *duress* agrees with our own, and cites Ff. 48, 21, 1.

(l) As to the laws relating to the poor, vide post, bk. iv. pt. iii. c. ii.

(m) Co. Litt. 132 a.

(n) 3 Inst. 213; 4 Bl. Com. 380. As to the doctrine of *attainder*, vide post, bk. vi.

(o) Co. Litt. 133 a; Newsome v. Bowyer, 3 P. Wms. 37, n. (B).

[person, as also an outlaw, was entirely cut off from society; and a monk, upon his profession, renounced solemnly all secular concerns; and besides, as the popish clergy claimed to be exempt from the duties of civil life and from the commands of the temporal magistrate, so the genius of the English law would not suffer those persons to enjoy the benefits of society, who had secluded themselves from it, and refused to submit to its regulations. A monk was therefore accounted *civiliter mortuus*: and upon entering into religion he might, like other dying men, make his testament and appoint his executors; and if he made no will, the ordinary might grant administration to his next of kin, as if he were actually dead intestate. And such executors or administrators had the same powers, and might bring the same actions for debts due *to* the religious, and were liable to the same actions for debts due *from* him, as if he were naturally dead (*p*). Nay, so far was this principle carried, that in a case where one became bound in a bond to an abbot and his successors; and afterwards made his executors, and professed himself a monk of the same abbey, and in process of time was himself made abbot thereof; here it was held that the law gave him, in the capacity of abbot, an action of debt against his own executors to recover the money due (*q*). In short, a monk or religious was so effectually dead in law, that a lease made even to a third person, during the life (generally) of one who afterwards became a monk, determined by such his entry into religion; for which reason leases, and other conveyances for life, were usually made to have and to hold for the term of one's *natural* life (*r*).] But, even in the times of popery, the law of England took no cognizance of *profession* in any foreign country, because the fact could not be tried in our courts (*s*); and therefore, after the Reformation, it was held that civil death could no

(*p*) Litt. s. 200.

(*q*) Co. Litt. 133 b.

(*r*) Archbishop of Canterbury's case, 2 Rep. 48 b; Co. Litt. 132 a.

(*s*) Co. Litt. 132 b.

longer take place by profession (*t*), nor (by the effect of 21 Jac. I. c. 28, s. 7, abolishing sanctuaries) by abjuration (*u*); nevertheless, it would still take effect on outlawry; but outlawry on civil process has also now been abolished (*x*).

This natural life being, as was before observed, the immediate gift of God, cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority. Nevertheless, it may be lawfully taken away (as before observed) in the necessary defence of life or limb; and is also capable of being forfeited for a breach of those laws of society which are enforced by the sanction of capital punishments; of the nature, restrictions, expediency, and legality of which we shall hereafter more conveniently inquire in a subsequent part of these Commentaries (*y*). At present it suffices to observe, that from the very nature of the social compact, on which all municipal laws are founded (*z*), no deprivation of life ought in any case to be inflicted, unless where such deprivation is indispensable to the protection of some public interest of adequate importance. All laws therefore savour of injustice and oppression, which authorize the destruction of life in order to secure a public object of comparatively trivial character; or even an object of the highest consequence to the public, if such object is capable of being sufficiently secured by some more lenient method. We shall find accordingly, that, though by the law of England the life of the delinquent may in certain cases be forfeited or ended, yet that punishment is only resorted to now as a remedy for the prevention of crimes of the deepest dye,—the severity by which our penal system was once unhappily distinguished having been progressively,

(*t*) *Rex v. Lady Portington*, 1 Salk. 162; and see *In re Metcalfe*, 33 L. J., Ch. 303.

(*u*) 1 Hale, P. C. 605.

(*x*) 42 & 43 Vict. c. 59, s. 3.

(*y*) *Vide post*, bk. vi.

(*z*) *Vide sup.* p. 26.

and now at length effectually, softened by the milder spirit of modern legislation. Moreover, the law of England is an utter stranger to any arbitrary power of killing or maiming the subject without the express warrant of law. [*“Nullus liber homo,”* says the Great Charter, *“aliquo modo destruatur, nisi per legale iudicium parium suorum aut per legem terræ”* (a). Which words, *“aliquo modo destruatur,”* include, according to Sir Edward Coke (b), a prohibition not only of *killing* and *maiming*, but also of *torturing* (to which our laws are strangers), and of every oppression by colour of an illegal authority; but *flogging* for due cause and in proper cases is still permitted by the law; and it is a punishment which (regarded as an incident of imprisonment) is in no sense a *torturing* of the prisoner. And there is this further protection to life and limb given by the law, namely, that by a statute of 5 Edw. III. c. 9, no man can be forejudged of life or limb, contrary to the Great Charter and the law of the land: and again, by the statute 28 Edw. III. c. 3, no man can be put to death without being first brought to answer by due process of law.]

2. A man is also entitled, as to his whole body, to security from all corporal assaults, insults, or injuries, whether by menaces, beating, wounding, or otherwise, though they amount not to destruction of either life or limb; and

3. To the preservation of his health from such practices as may prejudice or annoy it; and

4. To the security of his reputation or good name from libel and slander.

But these three last articles it will suffice to have barely mentioned among personal rights. It is to their infringement, rather than to the rights themselves, that the provisions of the law have been in general directed; and a more convenient place for their further discussion will

(a) C. 29.

(b) 2 Inst. 48.

consequently be found in that part of this work which relates to *wrongs* (*c*).

II. [Next to personal *security*, the law of England regards, asserts, and preserves the right of personal *liberty*. Personal liberty consists in the power of locomotion, of changing situation, or moving one's person about to whatsoever place one's own inclination may direct, without imprisonment, hindrance, or restraint, unless by due course of law. Concerning which we may make the same observations as upon the preceding article, namely, that personal liberty is a right strictly natural; that the law of England never abridges it without cogent reason; and that in this kingdom it cannot ever be abridged at the mere discretion of the magistrate, without the explicit permission of the law. Here again the language of the Great Charter is, that no freeman shall be taken or imprisoned, but by the lawful judgment of his equals, or by the law of the land (*d*). And many subsequent statutes of an early date expressly direct, that no man shall be taken or imprisoned on mere suggestion or petition to the king or his council, unless it be by legal indictment, or other due process of the common law (*e*). Also, by the Petition of Right, (3 Car. I.,) it is expressly declared, that no freeman shall be imprisoned or detained without cause shown, to which he may make answer according to law; and by 16 Car. I. c. 10, it was enacted that if any person should be restrained of his liberty by order or decree of an illegal court, or by command of the king's majesty in person, or by warrant of the council board, or of any of the privy council; he should upon demand of his counsel, have a writ of *habeas corpus* to bring his body before the court of King's Bench or Common Pleas; and such court should thereupon determine whether the cause of his commitment

(*c*) As to *Wrongs*, vide post, bk. v. and bk. vi.

(*d*) C. 29.

(*e*) 5 Edw. 3, c. 9; 25 Edw. 3, st. 5, c. 4; 28 Edw. 3, c. 3.

[were just, and should forthwith do as to justice should appertain.] And by 31 Car. II. c. 2, commonly called the *Habeas Corpus Act*, amended and made more effectual by 56 Geo. III. c. 100, the methods of obtaining the writ of *habeas corpus* are so plainly pointed out and enforced, that, so long as this statute remains unimpeached, no subject of England can be long detained in prison, except in those cases in which either the general law requires and justifies such detainer, or else some special legislation (always regrettable) has been found necessary so to provide in exceptional circumstances. Moreover, lest the *habeas corpus* should be evaded by demanding unreasonable bail or sureties for the prisoner's appearance, it is declared by 1 W. & M. sess. 2, c. 2, that excessive bail ought not to be required; though on the other hand, to prevent such abuses as are naturally apt to occur in the resort to a writ of this description, it is a rule with the courts that they will not grant a *habeas corpus* as of course and without probable cause shown (*f*).

[Of great importance to the public is the preservation of this personal liberty; for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper, as in France was once daily practised by the crown, there would soon be an end of all other rights and immunities (*g*). Indeed, some have thought that unjust attacks, even upon life or property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth, than such as are made upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act

(*f*) *Hobhouse's case*, 3 Barn. & Ald. 420. And see 56 Geo. 3, c. 100, by the express provisions of which there must, in the cases to which it applies, be "an affidavit showing a probable and reasonable

ground" for the complaint. For further information respecting the statutes of *habeas corpus*, and the procedure on applying for the writ, vide post, vol. III. bk. v. c. XII.

(*g*) See 1 Bl. Com. p. 135.

[of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom ; but confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. And yet sometimes, when the state is in real danger, even this may be a necessary measure, as has frequently happened in the administration of Ireland. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great, as to render this measure expedient ; for it is the parliament only (or legislative power) that, whenever it sees proper, by suspending the *Habeas Corpus Act* for a short and limited time, can enable the crown to imprison suspected persons, summarily and without the possibility of their obtaining their discharge, during that period, by any interference of the courts (*h*) ; as the senate of Rome was wont to have recourse to a dictator, a magistrate of absolute authority, when they judged the republic to be in grave and imminent danger. The decree of the senate, which usually preceded the nomination of this magistrate, “*dent operam consules, ne quid respublica detrimenti capiat*,” was called the *senatus consultum ultimæ necessitatis* : and in like manner in the law of England, recourse to this extreme remedy ought only to be had in cases of extreme emergency : for in these, but only in these, should the nation part with its liberty for a while, in order to preserve it for ever.

The confinement of the person in any wise, amounts in law to an imprisonment. So that the keeping a man against his will in a private house, the putting him in the stocks, or the arresting or forcibly detaining him in the street, is an

(*h*) The Habeas Corpus Act was suspended by 57 Geo. 3, cc. 3, 55 ; and again (so far as regards Ireland, in reference to the Fenian conspiracy there) by 29 & 30 Vict.

c. 1. And see the Peace Preservation (Ireland) Act, 1881 (44 Vict. c. 6), and the Prevention of Crime (Ireland) Act, 1882 (45 & 46 Vict. c. 25).

[imprisonment (*i*). And the law so much discourages unlawful imprisonment of every sort, that if a man is under *duress of imprisonment*, i.e., is *illegally* restrained of his liberty, until he seals a bond or the like, he may allege this duress, and afterwards avoid the extorted deed; but if a man be *legally* imprisoned, and, on any fair account, seals a bond or a deed, this is not by duress of imprisonment, and he is not at liberty afterwards to avoid it (*k*). To make a commitment to prison legal or lawful, it must either be by process from the courts, or by warrant from some person having authority to commit; which warrant must be in writing, under the hand and seal of him by whom it is given, and must express the cause or causes of the commitment, in order to be examined into, if necessary, upon a *habeas corpus*. If there be no cause expressed, the gaoler is not bound to detain the prisoner. For the law judges in this respect (saith Sir Edward Coke), like Festus the Roman Governor, that it is unreasonable to send a prisoner, and not to signify withal the crime alleged against him (*l*).

A natural and regular consequence of the right of personal liberty, is, that every Englishman may claim to abide in his own country so long as he pleases, and not to be driven from it or sent out of it, unless by the sentence of the law. The king indeed, by his royal prerogative, may issue his writ *ne exeat regno*, and prohibit any of his subjects from going into foreign parts without licence; for this may be necessary for the public service or for the due safeguarding of the commonwealth (*m*); but that writ (as we shall hereafter see) is now obsolete, save for certain limited purposes in civil proceedings; and no power on earth, except the authority of parliament, can send any subject of England *out of the land* against his will;] for exile was never sanctioned by the common law, except in the

(*i*) 2 Inst. 589.

(*k*) Ib. 482.

(*l*) Ib. 52, 53. See 1 Chitty, Crim. Law, 110 et seq.

(*m*) F. N. B. 85.

single case of abjuration above referred to (*n*); and though in comparatively modern times persons used to be conveyed to parts beyond the seas, *e.g.*, criminals under sentence of “transportation” (*o*), they were so dealt with either by their own choice to escape a capital punishment, or else under the express authority of some act of parliament (*p*). [And the Great Charter declares that no freeman shall be banished (*exuletur*), unless by the judgment of his peers, or by the law of the land (*q*). And by the *Habeas Corpus Act*, 31 Car. II. c. 2, it is enacted, that no subject of this realm, who is an inhabitant of England, Wales, or Berwick, shall be sent prisoner into Scotland, Ireland, Jersey, Guernsey, or places beyond the seas—where they cannot have the full benefit and protection of the common law—but that all such imprisonment shall be illegal: that the person who shall dare to commit another, contrary to this law, shall be disabled from bearing any office, shall incur the penalty of a *præmunire*, and shall be incapable of receiving the king’s pardon:] and that the party injured shall also have his private action against the person committing, and all his aiders, advisers and abettors, whereby he shall recover his costs and also damages to the extent of at least five hundred pounds (*r*).

[The law, as above explained, is so benignly and liberally construed for the benefit of the subject, that, though

(*n*) Co. Litt. 133 a. Vide sup. p. 145.

(*o*) Convicts are still sometimes conveyed to parts beyond the seas, under sentence of *penal servitude* which is now substituted for transportation. (See 20 & 21 Vict. c. 3; 22 Vict. c. 25.)

(*p*) It is said, that exile was first introduced as a punishment by the legislature in the thirty-ninth year of Eliz., when a statute enacted that “such rogues as were dangerous to the inferior people should

be banished the realm” (39 Eliz. c. 4; see Bar. Ant. Stat. 269); and that the first statute in which the word “transportation” is used is the 18 & 19 Car. 2, c. 3, which gave a power to the judges, at their discretion, either to execute, or to *transport* to America for life, the Mosstroopers of Cumberland and Northumberland.

(*q*) C. 29.

(*r*) As to the writ of *habeas corpus*, see further, bk. v. c. xii.

[*within* the realm the king may command the attendance and service of all his liegemen, yet he cannot send any man *out* of the realm, even upon the public service; excepting sailors and soldiers, the nature of whose employment of itself implies this exception.] Thus (says Coke) the sovereign cannot even constitute a man lord lieutenant of Ireland against his will, nor make him a foreign ambassador; for this might, in reality, be no more than exile (*s*), under the pretext of an honourable employment.

What has been hitherto said on the subject of personal liberty, refers, it will be observed, chiefly to the illegal restraint thereof by government. When imprisonment is illegally inflicted by a private subject, relief may, in the same manner, be had by *habeas corpus*: and redress may also be obtained by action; or the offender may be punished upon indictment. But the consideration of these methods, and the further discussion of the mode of proceeding upon *habeas corpus*, more properly belong to the consideration of civil injuries and of crimes. They are only glanced at in this place, and only in illustration of the importance attached by the law to the right now under consideration.

In connection with the rights of personal security and of personal liberty, may be mentioned also the right of the subject to carry such arms as are proper for his defence; which right is declared by the statute 1 W. & M. sess. 2, c. 2, and is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, applicable especially under circumstances where the sanction of society and law is found insufficient, or is not expeditious enough to protect life or limb, and to restrain the violence of oppression. There is an antient enactment, however, against going armed under such circumstances as may tend to terrify the people, or as may indicate an in-

(*s*) See 2 Inst. 46.

tention to disturb the public peace (*t*). And by a modern statute, the training of persons, without lawful authority, to the use of arms is prohibited; while any justice of the peace is authorized to disperse such assemblies of persons as he may find engaged in that occupation, and to arrest any of the persons present (*u*).

(*t*) 2 Edw. 3, c. 3; see Hawk. Pleas of the Crown, bk. 1, c. 63, ss. 9, 10.

(*u*) 60 Geo. 3 & 1 Geo. 4, c. 1. It may be remarked, that the volunteer rifle and artillery forces, being trained under lawful authority, viz. under the provisions of the Volunteer Acts, 1863 and 1869 (26 & 27 Vict. c. 65, and 32 & 33 Vict. c. 81), are not affected by the enactments mentioned in the text, any more than the militia, yeomanry, or

regular troops of the line. And see the Army Annual Act, 1882 (45 & 46 Vict. c. 7); the Reserve Forces Acts, 1882 and 1890 (45 & 46 Vict. c. 48; 53 & 54 Vict. c. 42); the Militia Act, 1882 (45 & 46 Vict. c. 49); and the Army Annual Acts, 1883 (c. 6), 1884 (c. 8), 1885 (c. 8), 1886 (c. 8), 1887 (c. 2), 1888 (c. 4), 1889 (c. 3), 1890 (c. 4), 1891 (c. 5), 1892 (c. 2), 1893 (c. 4), and 1894 (c. 3).

BOOK II.

OF RIGHTS OF PROPERTY.



AS TO PROPERTY IN GENERAL.

THE rights of property remain secondly to be considered; and such rights consist in a man's free use, enjoyment, and disposal, according to the laws of the community, of all his acquisitions in the external things around him; and it may be desirable to premise a few observations on the nature and origin of these rights, before we proceed to distribute and consider their several objects.

[The rights in question, though we speak of them in the plural, in regard to the different objects over which a man has ownership, and the different modifications of that ownership, are yet capable of being reduced, and for the purpose of abstract discussion are usually reduced, to one general head—the right of property, or the principle by which one man claims and exercises a sole and despotic dominion over certain of the external things of the world, to the total exclusion of all other individuals. However generally recognized that right may be, there are very few that will give themselves the trouble to consider its origin and foundation, most people resting satisfied with the decision of the law in their favour, without examining the reason or authority upon which the law has been built (*a*), and thinking it enough that their title is derived

(*a*) Bl. Com. vol. ii. p. 2.

[under the grant of some former proprietor, or by descent from some ancestor, or by the last will and testament of some dying owner; and they do not stop to reflect that there is no foundation in natural law, why a set of words upon parchment should convey the dominion of land, or why the son should have a right to exclude his fellow-creatures from a determinate spot of ground, because his father had done so before him, or why the possessor of a particular field, or of a jewel, when lying on his death-bed, and no longer able to maintain the possession of it, should be entitled to dictate to the rest of the world who shall enjoy it after him. And, doubtless, these inquiries would be useless and even troublesome in common life; and it is well that the mass of mankind obey the law, without scrutinizing too nicely into the reason of it; but when law is to be considered not only as a matter of practice, but also as a rational science, it cannot be improper or useless to examine more deeply the rudiments and grounds of these positive constitutions of society.

In the beginning of the world, as we are informed by holy writ, the all-bountiful Creator gave to man "dominion over all the earth; and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth" (b). The earth, therefore, and all things therein, under this immediate gift of the Creator, are the general property of all mankind; and while the earth continued with few inhabitants, it is reasonable to suppose that all was in common among them, and that every one took from the public stock, to his own use, such things as his immediate necessities required; and these general notions of property were then sufficient to answer all the purposes of human life; "*erant omnia communia et indivisa omnibus, veluti unum cunctis patrimonium esset*" (c). This communion of goods seems, however, not to have been applicable, even in the earliest

(b) Genesis, i. 28.

(c) Justin, l. 43, c. 1.

[ages, to aught but the *substance* of the thing ; it did not extend to the *use* of it. For, even by the law of nature, he who first began to use a thing, acquired therein a kind of transient property, which lasted as long as he was using it ; or, to speak with greater precision, the *right* of possession continued while the *fact* of possession continued (*d*). Thus the earth was in common, and no part of it was the permanent property of any one in particular ; yet whoever was in the occupation of any determined or definite piece or parcel of land,—for rest, for shade, or the like, acquired for the time being a sort of ownership therein, from which it was unjust, and contrary to the law of nature, to drive him by force, or to deprive him of it ; though the instant that he quitted the use and occupation of it, another person might seize it without injustice. Thus also a vine or other tree might be said to be in common, as all men were equally entitled to its produce ; and yet any private individual might gain the sole property of the fruit which he had gathered for his own repast,—a doctrine well illustrated by Cicero, who compares the world to a great theatre, which is common to the public, and yet the place which any man has taken in it is, for the time, his own (*e*).

But when mankind increased in number, craft, and ambition, it became necessary to entertain the conception of a more permanent dominion, and to appropriate to individuals not the immediate *use* only, but the very *substance* of the thing to be used, that is to say, the very property in it ; otherwise innumerable tumults must have arisen, and the good order of the world have been continually broken and disturbed, while a diversity of persons were striving who should get the first occupation of the same thing, or were disputing which of them had actually gained it. As human life also grew more and more refined, conveniences

(*d*) Barbeyr. Puff. l. 4, c. 4.

ejus esse eum locum quem quisque occupavit.—De Fin. l. 3, c. 20.

(*e*) “*Quemadmodum theatrum, cum commune sit, recte tamen dici potest,*

[were devised to render life more easy, commodious and agreeable; *e.g.*, habitations for shelter and safety, and raiment for warmth and decency. But no man would have been at the trouble to provide either, so long as he had only an usufructuary property in them, which was to cease the instant that he quitted the possession thereof;—if, as soon as he walked out of his tent, or pulled off his garment, the next stranger who came by would have a right to inhabit the one, and to wear the other. Even the brute creation, to whom every thing else was in common, maintained a kind of permanent property in their dwellings, especially for the protection of their young; the birds of the air had nests, and the beasts of the field had caverns, the invasion of which they resented as a very flagrant injustice, and they would even sacrifice their lives to preserve them. Hence a property was soon established among mankind also, in their individual houses, and huts or cabins, and more especially in the weapons and other moveable articles which they carried about with them, and which they must have more or less improved by their own bodily labour; which bodily labour, bestowed upon any subject which before lay in common to all men, is universally allowed to strengthen, very materially, the title that mere occupancy gives to an exclusive property therein.

The article of food was a more immediate call, and therefore a more early consideration. Such as were not contented with the spontaneous products of the earth, sought for more solid refreshment in the flesh of beasts, which they obtained by hunting. But the frequent disappointments, incident to that method of provision, induced them to gather together such animals as were of a more tame and sequacious nature; and to establish a permanent property in their flocks and herds, in order to sustain themselves in a less precarious manner, partly by the milk of the dams, and partly by the flesh of the young. The support of these their cattle made the article of *water* also a very important point. And therefore the Book of

[Genesis (the most venerable monument of antiquity) furnishes us with frequent instances of violent contentions concerning wells; the exclusive property of which appears to have been established in the first digger or occupant, even in places where the ground and herbage still remained in common. Thus we find Abraham, who was but a sojourner, asserting his right to a well in the country of Abimelech, and exacting an oath for his security, “because he had digged that well” (*f*). And Isaac, about ninety years afterwards, reclaimed this his father’s property; and, after much contention with the Philistines, was suffered to enjoy it in peace (*g*).

All this time the soil and pasture of the earth remained still in common as before, and open to every occupant; except perhaps in the neighbourhood of towns, where the necessity of a sole and exclusive property in lands (for the sake of agriculture) was earlier felt, and therefore more readily acceded to. In the earliest ages, when the multitude of men and cattle had consumed every particle of sustenance on one spot of ground, they seized upon and occupied such other lands as would more easily supply their necessities,—a practice which is still retained among the wild and uncultivated nations of the earth, like the Tartars and others in the east; where the climate itself, and the boundless extent of their territory, conspire to retain them still in the same savage state of vagrant liberty which was universal in the earliest ages; and which Tacitus informs us, continued among the Germans till the decline of the Roman Empire (*h*); and the same practice is illustrated in the history of the dispute between Abraham and his nephew Lot (*i*), and their respective herdsmen and families, when Lot chose to go eastward to the plain of Jordan, and Abraham chose to remain in the land of Canaan, a choice which plainly indicates that either might occupy whatever

(*f*) Genesis, xxi. 30.

(*g*) Ib. xxvi. 15, 18, &c.

(*h*) “*Colunt discreti et diversi*;

ut fons, ut campus, ut nemus, placuit.”—De Mor. Ger. 16.

(*i*) Genesis, xiii.

[land he pleased, being land not already occupied by some other family.

The same principle explains the right of migration, or of sending colonies to find out new habitations, when the mother country was overcharged with its own people, as practised in early times as well by the Phœnicians and Greeks, as by the Germans, Scythians, and other northern people, and as still practised at the present day. And, so long as this migration was confined to the stocking and cultivation of desert uninhabited countries, it kept strictly within the limits of the law of nature; but how far the seizing on countries already peopled, and driving out or massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour; how far such conduct was or is consonant to nature, to reason, or to Christianity, deserved and deserves well to be considered by those nations who have rendered their names immortal by colonizing enterprises.

As the world by degrees grew more populous, it daily became more difficult to find out new spots to inhabit, without encroaching upon former occupants; and it became therefore necessary to pursue some method of dealing with the land already occupied which would make it perpetually fruitful; whence arose the art of agriculture,—an art which gradually established the idea of a more permanent property in the land; for without an assured continuance of the occupation of land, who would have been at the pains to cultivate it? Necessity therefore begat property; and in order to ensure that property, recourse was had to civil society, which brought along with it a long train of inseparable concomitants,—states, governments, laws, punishments, and the public exercise of religious duties.]

The idea of property seems therefore to have had its original foundation in *occupancy*, confirmed and strengthened by *labour*. [The reason why *occupancy* should

[convey the right of property has been variously accounted for,—Grotius and Puffendorf insisting that this right of occupancy as a mode of acquiring property is founded on a tacit and implied assent of all mankind; and Barbeyrac, Locke, and others holding that no such implied assent is necessary, for that occupancy alone without any consent or compact, is sufficient of itself to vest a title to the property. But this distinction is of a character more subtle than practical; and at all events both sides agree in this, that occupancy is the thing by which the title was in fact originally gained (j).]

Property, both in lands and in moveables, having been thus acquired by occupancy, the title so acquired continues in the occupant, by the principles of universal law, until such time as he does some act to abandon it. Therefore, if one possessed of a jewel cast it into the sea, this is such an express dereliction, that a new property in the jewel will be vested in the first fortunate finder that will seize it to his own use again; on the other hand, if the owner hide it privately in the earth, that is no dereliction, and the casual finder of it acquires no property therein; for the owner hath not by such an act declared any intention to abandon it, but rather the contrary; so if he lose it, or drop it by accident, it cannot be collected from thence that he designed to quit the possession; and therefore in all such cases the property still remains in the loser, who may claim it again of the finder.

But although property was thus acquired and thus continued in the case of things in general, whether land or moveables, still there were (and there always must be) some few things, which must unavoidably remain in common, being such wherein nothing but an usufructuary property is capable of being had; and which therefore

(j) In Maine's Treatise on Ancient Law (p. 254), the theory, that the origin of property is the assent of mankind to the occupation by

individuals, is contrasted with the doctrine of Savigny, that property was acquired by adverse possession gradually ripened by prescription.

[still belong to the first occupant, and pass from occupant to occupant, during the time that each occupant holds possession of them, and no longer. Such (among others) are the elements of light, air, and water, which a man may occupy by means of his windows, his gardens, his mills, and other conveniences; and such also are the generality of those animals which are said to be *feræ naturæ*, or of a wild and untameable disposition, which (subject to certain restrictions) any man may seize upon and keep for his own use or pleasure. All these things, so long as they remain in possession, every man has a right to enjoy without disturbance; but if once they escape from his custody, though without his voluntary abandonment, they return to the common stock, and every fresh occupant acquires for the time a new property therein.

The right of ownership once established, soon drew after it the right of transfer. It was found, that what became useless to one man, was highly useful to another; and that the latter was ready to give in exchange for it some equivalent which promised to be of equal use to the former proprietor. Thus a sort of mutual convenience prepared the way for, and suggested, a commercial traffic in things, and this involved the transfer of property by sale, grant, or conveyance,—in which transfer was involved both the abandonment of the thing by the previous owner, and its immediate occupancy by the new proprietor.

If all property ceased upon death, it would follow by the principles before established, that the next immediate occupant would acquire a right to all that the deceased possessed. But as, under civilized governments, such a constitution would be productive of endless disturbances, the universal law of almost every nation has either given the dying person a power of continuing his property, by disposing of his possessions by will; or, in case he neglects to so dispose of them, or is not permitted to make any such disposition at all, the municipal law of the country then steps in, and declares who shall be the successor,

[representative, or heir of the deceased ; in other words, who alone shall have the right to enter upon this vacant possession (*k*) ; and in case no such disposition is made, and no such successor is found as the law requires, then in this case, and in order to prevent the robust title of occupancy from again taking place, the doctrine of *escheats* has been adopted in almost every country ; whereby the sovereign of the state, and those who claim under his authority, are the ultimate heirs, and succeed to those inheritances to which no other title can be formed (*l*).]

As to the right, however, of the children or nearest relations of the deceased to inherit,—a right much more antient than the right of alienation,—there seems good reason to refer this right to the same natural title of occupancy, on which the right of property itself is founded. [A man's children or nearest relations are usually about him on his death-bed, and are the earliest witnesses of his decease. They became therefore generally the next immediate occupants, till at length in process of time this frequent usage ripened into general law ; whence also, in the earliest ages, on failure of children, a man's servants born under his roof were allowed to be his heirs, being immediately on the spot when he died,—the patriarch Abraham expressly declaring, that since God had given him no seed, his steward Eliezer, one born in his house, should be his heir (*m*).

While property continued only for life, testaments were of course useless and unknown : and when it became inheritable, the children or heirs at law were for a long time incapable of exclusion by will ; but so strict a rule of inheritance made heirs disobedient and headstrong, defrauded

(*k*) Thus, to prevent any vacancy of possession, the civil law considered father and son as one person ; so that, upon the death of either, the inheritance did not so properly descend, as continue in

the hands of the survivor. (See *FF.* 28, 2, 11.)

(*l*) As to *escheats*, vide post, *pt.* I. c. XII.

(*m*) *Gen.* xv. 3.

[creditors of their just debts, and prevented many provident fathers from dividing or charging their estates as the exigencies of their families required; and accordingly the power of testamentary disposition was gradually recognized; that is to say, the right of disposing of one's property, or a part of it, by *testament*, i.e., by written or oral instructions properly witnessed and authenticated, according to the pleasure of the deceased, which we therefore emphatically style his *will*. This power was established in some countries much later than in others.] With us in England, as the law stood in the reign of Henry the second, the testamentary power of a man over his moveable possessions was limited, for he could then only dispose of one-third of them to the exclusion of his wife and children; but this restriction soon fell out of use. As to lands, these, before the Conquest, were fully devisable; but afterwards, and until the reign of Henry the eighth, the general law (subject to special customs in particular places) was, that they could only be devised for a term of years, and only a certain portion of them even to that limited extent: and it was not till after the Restoration, that the power of devising real property became universal (n).

Wills Act
7 Will IV.
c. 26 s. 3

Wills and testaments are obviously in their nature of a date posterior to the formation of civil society, and must be considered as the mere creatures of the municipal law; by which also it is clear that the particular modifications of the law of inheritance and succession are alone regulated. [Accordingly we find that every distinct country has different ceremonies and requisites to make a testament completely valid: neither does anything vary more than the right of inheritance under different national establishments. In England, particularly, this diversity is carried to such a length, as if it had been meant to point out the power of the laws in regulating the succession to property, and

(n) This arose in consequence of the conversion of tenure in chivalry into tenure in socage, by the st. 12

Car. 2, c. 24; vide post, bk. II. pt. I. c. II. and c. XX.

By the Statutes of
1163 (32 Hen. VIII c. 1;
35 Hen. VIII c. 5)
order of the simple
to try tenure of
of service was
to devise
a holder in socage
devise them all.

[how futile every claim must be that has not its foundation in the positive rules of the state. In general only the eldest son, in some places only the youngest, in others all the sons together, have a right to succeed to the inheritance: in real estate, males are preferred to females, and the eldest male will usually exclude the rest: in the division of personal estate on the other hand, the females of equal degree are admitted together with the males, and no right of primogeniture is allowed.]

Such is the origin that we are disposed to assign to property itself, and to the power of transferring or transmitting property, considered in the abstract. However, it is clear that all proprietary rights, as we now find them established in any country, rest on the municipal law as their *immediate* basis; and, like those relative to life and limb, these rights have always been guarded by the laws of England with peculiar vigilance, and have been frequently recognized in distinct and emphatic terms by the legislature. [Thus the Great Charter has declared, that no freeman shall be disseised or divested of his freehold, or of his liberties, or free customs, save by the judgment of his peers, or by the law of the land (*o*). And by a variety of antient statutes it is enacted, that no man's lands or goods shall be seized into the king's hands against the Great Charter and the law of the land; and that no man shall be disinherited, nor put out of his franchise or freehold, unless he be first duly brought to answer and be fore-judged by course of law; and if anything be done to the contrary, it shall be redressed and holden for none (*p*).]

Even for the general good of the whole community, no unnecessary violation of the rights of property is, in any instance, allowed by our law. If a new road, for example, is to be made through the grounds of a private person, in a case where it would be extensively beneficial to the

(*o*) C. 29.

(*p*) See 5 Edw. 3, c. 9; 25 Edw. 3, st. 5, c. 4; 28 Edw. 3, c. 3.

public, the legislature never permits itself to do this without the consent of the owner of the land, or at least without securing to him a complete indemnification. In vain may it be urged that the good of the individual ought to yield to that of the community. The true principle applicable to all such cases is one to which we have had occasion already to refer, and which is constantly borne in view by the English law, viz., that the private interest of the individual is never to be sacrificed to a greater extent than is necessary to secure a public object of adequate importance. The public, therefore, is considered in all such transactions as an individual treating with an individual, for an exchange; and all that the legislature does is to oblige the private owner to alienate his possession for a reasonable price; and even this is an exertion of power which it indulges with caution, and which nothing but the legislature can perform (*q*).

Nor is this the only instance in which the law of the land has postponed the public interest to the sacred and inviolable rights of private property. Thus no subject of England can be constrained to pay any aids or taxes, even for the defence of the realm or for the support of the government, but such as are imposed by his own consent or that of his representatives in parliament. For by the statute 25 Edw. I. c. 1, it is provided that the king shall not take any tallage or aid but by the assent of the archbishops, bishops, earls, barons, knights, burgesses, and other freemen of the land (*r*); and again by 14 Edw. III. st. 2, the prelates, earls, barons, and commons, citizens,

(*q*) See, e. g., 8 & 9 Vict. c. 18 (called "The Lands Clauses Consolidation Act, 1845"), for consolidating into one Act the provisions usual in Acts authorizing the taking of lands for undertakings of a public nature.

(*r*) See however the introduction to the Great Charter (edit. Oxon.),

sub anno 1297; wherein it is shown that this statute, (called *De tallagio non concedendo*,) supposed to have been made in 34 Edw. 1, is in reality nothing more than a sort of translation into Latin of the *Confirmatio cartarum*, 25 Edw. 1, which was originally published in the Norman language.

burgesses, and merchants, shall not be charged to make any aid, if it be not by the common assent of the great men and commons in parliament. [And as this fundamental law had been shamefully evaded under many succeeding princes, by compulsory loans, and benevolences extorted without any real consent, it was made an article in the Petition of Right, 3 Car. I., that no man shall be compelled to yield any gift, loan, benevolence, tax, or such like charge, without common consent by act of parliament. And, lastly, by the statute 1 Will. & Mary, sess. 2, c. 2, it is declared, that levying money for or to the use of the Crown, by pretence of prerogative, without grant of parliament, or for longer time or in other manner than the same is or shall be so granted, is illegal.]

PART I.

OF THINGS REAL.

THE subjects of property, in the law of England, are *things*, as contradistinguished from *persons*; and things are distributed into two kinds, things *real*, and things *personal*. Things *real*, (otherwise called realty,) consist of things substantial and immoveable, and of the rights and profits annexed to or issuing out of them; while things *personal*, (otherwise called personalty,) consist of goods, money, and all other moveables, and of such rights and profits as relate to moveables (*a*).

The First Part of the present Book will consequently relate to things Real, and the Second to things Personal.

(*a*) Blackstone says, “*things real* are such as are permanent, fixed and immoveable, which cannot be carried out of their place, as lands or tenements—*things personal* are goods, money, and all other moveables which may attend the owner’s person wherever he thinks proper to go.” (2 Bl. Com. p. 16.) It has been thought expedient to deviate from these definitions, which, among other objections to them, appear to be too limited, as referring to things of a substantial or solid kind only, without embracing incorporeal rights. His definition of things personal, however, does not appear to be

fairly open to the objection that has been sometimes made to it, of not being extensive enough to comprise *chattels real*. For it is more correct and convenient to keep the idea of the subjects in which property may be acquired, separate from the idea of the estate or interest that may be acquired in these subjects. A chattel real is, properly speaking, not a thing personal, but rather a particular kind of estate in a thing real. It is, however, for many purposes, properly designated as *personal estate*. This is a matter that we shall have occasion to notice more fully hereafter.

CHAPTER I.

OF THE DIVISIONS OF THINGS REAL.



THINGS real are usually said to consist in lands, tenements, or hereditaments. [Land, says Sir Edward Coke, comprehendeth in its legal signification any ground, soil, or earth whatsoever; as arable, meadows, pastures, woods, moors, waters, marshes, furzes and heath (*a*). It legally includeth also all castles, houses, and other buildings: for they consist, saith he, of two things; *land*, which is the foundation, and *structure* thereupon; so that if I convey the land or ground, the structure or building passeth therewith. It is observable that *water* is here mentioned as a species of land, which may seem a kind of solecism; but such is the language of the law: and therefore I cannot bring an action to recover possession of a pool or other piece of water by the name of *water* only; either by calculating its capacity, as for so many cubical yards; or by superficial measure, as for twenty acres of water; or by general description, as for a pond, a water-course, or a rivulet: but I must bring my action for the land that lies at the bottom, and must call it twenty acres of *land covered with water* (*b*). And so if I grant a certain *water*, though the right of fishing passes, yet the soil does not (*c*). For water is a moveable wandering thing, and must of

(*a*) Co. Litt. 4 a; Ewer *v.* Hayden, Cro. Eliz. 476; Cooke *v.* Yates, 4 Bing. 90.

(*b*) Challoner *v.* Thomas, Brownl. 142.

(*c*) Co. Litt. 4 b.

2. buildings or structures upon it.
3. trees and plants.
4. all things permanently affixed to it.
5. The space above and beneath.

[necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary property therein: wherefore, if a body of water runs out of my pond into another man's, I have no right to reclaim it (*d*). But the land which that water covers, is permanent, fixed and immoveable: and therefore in this I may have a certain substantial property, of which the law will take notice, and not of the other. Land hath also, in its legal signification, an indefinite extent upwards as well as downwards. *Cujus est solum, ejus est usque ad cælum*, is the maxim of the law; upwards, therefore no man may erect any building, or the like, to overhang another's land; and downwards, whatever is in a direct line between the surface of any land and the centre of the earth, belongs in general to the owner of the surface. So that the word "land" includes not only the face of the earth, but everything under it or over it (*e*). And therefore if a man grant all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows. Not but the particular names of the things are equally sufficient to pass them (*f*); but the capital distinction is this, that by the name of a messuage, toft, croft, or the like, nothing else will pass, except what falls with the utmost propriety under the term made use of; but by the name of land, which is *nomen generalissimum*, everything terrestrial will pass (*g*),]—and that is by the common law; apart altogether from the even more extended meaning which may, by particular statute, be assigned to the word *land* (*h*).

(*d*) *Race v. Ward*, 4 Ell. & Bl. 702.

(*e*) *Shep. Touch.* 90; *Raine v. Alderson*, 1 Arnold, 329.

(*f*) Blackstone here adds, "except in the instance of *water*;" but the case of water cannot properly be considered as an exception,

because "water" is *not* the particular name, in contemplation of law, of the thing intended to be passed.

(*g*) *Co. Litt.* 4 a—6 b.

(*h*) 3 & 4 Vict. cc. 105, 106, *et passim*.

The word *tenement* is of still greater extent, and though in its ordinary acceptation it is only applied to houses and other buildings, yet in its original proper and legal sense, it signifies everything that may be *holden*, that is, be the subject of *tenure*, of which we shall speak at large in the following chapter. In ordinary legal intendment, it includes not only *land* (which is the primary subject of tenure), but rents, commons, and several other rights and interests issuing out of or concerning land (*i*).

But *hereditament*, says Sir Edward Coke, is by much the largest and most comprehensive expression (*j*) ; for it includes not only lands and tenements, but whatsoever may be *inherited*, be it corporeal or incorporeal, real, personal, or mixed. Thus an heirloom, or implement of furniture, which by custom descends to the heir together with the house or land, is neither land nor tenement, but a mere moveable: yet, being inheritable, is comprised under the general word hereditament: and so a condition, the benefit of which may descend to a man from his ancestor, is also a hereditament (*k*).

It is under the larger term of hereditaments, though it be not strictly confined to things real, that the subjects of real property have been usually arranged; and to this method it will therefore be most convenient to adhere. Hereditaments, then, are of two kinds, *corporeal* and *incorporeal*. Corporeal consist of such as affect the senses, such as may be seen and handled by the body; incorporeal are not the objects of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation. If we apply the word hereditaments to the realty only (which is its most ordinary use), "corporeal" hereditaments are in fact the same with land, of which

(i) Co. Litt. 6 a, 20 a, 78 a; R. v. Dersingham, 7 T. R. 671; Vin. Ab. Grants (T).

(j) Co. Litt. 6 a; Moore v. Denn, 2 Bos. & Pul. 251; Pocock v.

Bishop of London, 3 Brod. & Bing. 33.

(k) Winchester's case, 3 Rep. 2 b.

enough has been said; “incorporeal” are the rights and profits annexed to or issuing out of land. It is to corporeal hereditaments that our attention must be first directed; and whatever is said generally, hereafter, as to the law of real property, is to be understood as referring to its corporeal subjects only, until those of the incorporeal kind present themselves, in their turn, for separate consideration, in a distinct chapter (*l*).

(*l*) Vide post, bk. II. pt. I. c. XXIII.

CHAPTER II.

OF TENURES.



IN proceeding to treat of corporeal hereditaments, we shall consider, in the first place, the tenures by which they may be holden; secondly, the estates which may be had in them (*a*); and, lastly, the title to them, or the manner in which those estates may be acquired and lost (*b*). And, first, as to *Tenures*.

These it will be impossible to understand with any degree of accuracy, unless we have some previous acquaintance with the nature of feuds, or the feudal law; a system established during the middle ages throughout the greater part of the European continent, and from thence derived to England, where its spirit still lives in several of her institutions. This chapter will therefore be dedicated, in the first instance, to an inquiry into the feudal system; after which we shall revert to our own municipal law, and particularly that branch of it which relates to the *Tenure* of real property, a doctrine which we shall find to be altogether founded upon feudal principles.

Feuds were introduced under the new dynasties founded by the barbarous tribes, who, during the fourth, fifth, and sixth centuries, poured themselves from Germany and the neighbouring countries into the Roman empire (*c*). In

(*a*) Vide post, bk. II. pt. I. cc. III.
—IX.

(*b*) Ibid. cc. X.—XXII.

(*c*) Spelman on Feuds; Wright on Tenures; Co. Litt. by Harg. 64 a, n. (1); 191 a, n. by Butler.

every province which they subjugated, large tracts of territory were divided by lot among the conquerors, some portion falling to the king or general of the invading tribe, and the rest to his soldiers, who received their shares as free and independent property, subject only to the condition of bearing arms, as occasion might require, in the defence of the community from hostile aggression. Of the lands assigned to the sovereign of the tribe, certain portions were afterwards usually distributed by him among his adherents, and chiefly among his courtiers or companions (*comites*): but the interest they derived under these grants was not strictly in the nature of property; it was of a beneficial or usufructuary kind only, a mere stipendiary return for services (commonly services of a military description) which they were expected to render to their master, and subject at some future period to resumption; the *proprietas*, or actual ownership of the land, being considered as still residing in the sovereign himself.

This species of interest, which we find at first described as a *benefice* (*d*), was called, about the close of the tenth century (and, as there is reason to suppose, much earlier) a *feud* (*e*),—a term which signified in the German language a stipendiary estate, and stood in contradistinction to *allodium* (*f*), the phrase applied to that independent species of property, before described, which had originally

(*d*) The portions of land thus distributed were at first revocable at the will of the lord, and were then, it is said, called *munera*. They were afterwards held for some limited time (usually one year), and called *beneficia*. In process of time they began to be granted in perpetuity, and were then called *feuda*. (Spelman on Feuds, 4, 6, 9; Cowell's Interpreter, *in verb.*)

(*e*) *Feudum* is said to be compounded of *od*, possession or estate, and *feo*, wages, pay.—Robertson's

Hist. Ch. V. vol. i. n. (8), citing Wachteri, Gloss. Germ. voc. *Feodum*.

(*f*) *Allodium* is stated by Robertson (*ubi sup.*) to be compounded of the German particle *an* and *lot*, and to signify land obtained by lot; and he cites the same glossary, voc. *Allodium*. Another derivation, however, is given by Blackstone, who considers it as compounded of *all* (*totum*), and *odh* (*proprietas*) in the Northern languages.—2 Bl. Com. p. 45, n.

become vested by allotment in the conquerors of the country. There began thus to arise two distinct modes of holding or possessing land. The stipendiary held *of* (that is, in relation to and in dependence upon) a superior; the allodialist held of no one, but enjoyed his land as free and independent property; the first of these methods applying exclusively to royal domains granted out in the manner we have described, the other to such land as had been allotted to the troops on the original conquest, or to land never appropriated by the barbarians, but left in the possession of the antient owners; for the holding of this latter was of the same independent character, and received the same appellation of *allodium*.

The interest of the stipendiary or beneficiary tenant did not originally extend beyond his own life, if it was not even determinable at the royal pleasure; but in course of time it gradually improved in stability, and acquired an *hereditary* character, which led by a natural progress to the practice of *subinfeudation*; for the stipendiary, (or feudatory, as he should now rather be termed,) considering himself as substantially the owner, began to imitate the example of his sovereign, by carving out portions of the benefice or feud, to be held of himself by some other person, on terms and conditions similar to those of the original grant; and a continued chain of successive dependencies was thus established, connecting each stipendiary, or *vassal* as he was termed (*g*), with his immediate superior or *lord*.

The beneficiary or feudal relation was well suited to those times of violence and insecurity, and was found by experience to be attended with great advantage both to the lord and the vassal: to the former, as it secured to him a band of military retainers, attached by duty and by sentiment to his person; and to the latter, as it brought

(*g*) From *gwas*, a Celtic word for a servant.—Hallam's *Middle Ages*, p. 155, 7th ed.

them into close connection with a powerful superior, under whom they found that shelter from oppression, which the law was then too weak to afford. The effect of this, as regarded the allodial species of property, was remarkable: the allodialist, though enjoying a nominal independence, was yet envious of the comparative security of the feudal vassal, and therefore gradually placed himself in the same or a similar relation, changing the nature of his property from allodial to feudal; which change he effected by giving up or surrendering his land to some powerful lord, and receiving it back again from him in the shape of a beneficium or feud, to be held upon some kind of service; or, more simply, by merely *acknowledging* himself to hold as a vassal to some chosen lord, under specified services, as if by the effect of a former grant, which had, in truth, never taken place. In one or other of these methods, allodial lands were largely converted into feudal; still, there were many estates which always continued to be held allodially (*h*).

Such is the true history of the origin and establishment of the feudal system (*i*); it was not according to the theory adopted by Blackstone, so much an invention of government applied systematically to the management of conquered countries, with a view to security from foreign invasion or domestic insurrection (*k*); but rather it was a conventional arrangement of property, established by gradual usage, and brought into general acceptance by its tendency to protect persons of inferior rank from the inconveniences of civil disorder; at the same time it did also tend to aggrandize the more powerful lords; and it did also operate to maintain an effective force to meet hostile invaders (*l*).

[The feud was conferred by words of gratuitous and

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|---|-------------------------------------|
| (<i>h</i>) Co. Litt. by Harg. 65 a, | vol. i. pp. 142—323, 7th edit. |
| n. (1). | (<i>k</i>) 2 Bl. Com. pp. 45, 46. |
| (<i>i</i>) Robertson's Charles V. vol. i. | (<i>l</i>) 2 Bl. Com. p. 46. |
| n. (8); Hallam's Middle Ages, | |

[pure donation, *dedi et concessi*; which would still be the operative words in a modern infeudation or deed of feoffment in the English law. This donation was perfected by the ceremony of corporal investiture, or open and notorious delivery of possession in the presence of the other vassals; which delivery perpetuated among them the era of the new acquisition, at a time when the art of writing was very little known, and therefore the evidence of property was reposed in the memory of the neighbourhood; who, in case of a disputed title, were afterwards called upon to decide the difference, not only according to external proofs adduced by the parties litigant, but also by the internal testimony of their own private knowledge.

Besides an oath of *fealty*, or profession of faith to the lord, which was the parent of our oath of allegiance, the vassal or tenant, upon investiture, usually did *homage* to his lord; openly and humbly kneeling, being ungirt, uncovered, and holding up his hands both together between those of the lord, who sat before him, and there professing that “he did become his *man* from that day forth, of life and limb and earthly honour;” and then he received a kiss from his lord (*m*). Which ceremony was denominated *homagium*, or *manhood*, by the feudists, from the stated form of words, *devenio vester homo* (*n*).]

Besides the fealty and homage, the relation of lord and vassal was ordinarily attended with the following feudal incidents (*o*):—1. *Aid*, which was originally a mere benevolence voluntarily granted by the vassal to his lord in time

(*m*) Litt. s. 85.

(*n*) It was an observation of Dr. Arbuthnot that tradition is nowhere preserved so pure and incorrupt as among children, whose games and plays are delivered down invariably from one generation to another. (Warburton’s notes on Pope, vi. 134, 8vo.) It will not, perhaps, be thought puerile to remark in

confirmation of this observation, that in an antient game described by Julius Pollux (*Onomastic*, l. 9, c. 7), under the title of *basilinda*, or *the king I am*, the ceremonies and language of feudal homage are preserved with great exactness.

(*o*) Hallam’s Middle Ages, vol. i. p. 181, 7th ed

of difficulty and distress (*p*) ; but which in process of time came to be considered as a matter of right. 2. *Relief*, which was a tribute paid to the lord, for “*taking up*” the estate which had lapsed or fallen in by the death of the last tenant : for while the feuds were not properly hereditary, but granted by favour of the lord only to the children of the former possessor, the heir used generally to pay a fine or acknowledgment to the lord, in horses, arms, money, or the like, for the renewal of the feud ; and this was called a relief, because, in the words of the feudal writers, “*incertam et caducam hereditatem relevat.*” And this relief afterwards, when the feuds became absolutely hereditary, continued to be paid on the death of the tenant, though the original reason of it had ceased to apply. [3. *Fine on alienation*, being a sum of money paid to the lord by the tenant whenever he had occasion to make over his land to another ; for, the reason of conferring the feud having been the personal abilities of the first feudatory to serve in war, it was not fit he should, without the lord’s consent, transfer this gift, either from himself, or from his posterity who were presumed to inherit his valour, to others who might prove less able. And as the feudal obligation was looked upon as reciprocal, the feudatory being entitled to the lord’s protection in return for his own fealty and service, therefore the lord could no more transfer his seigniorship or protection, without the *attornment*, that is to say, the consent of his vassal, than the vassal could transfer his feud without the consent of his lord (*q*) ; it being equally unreasonable that the lord should extend his protection to a person to whom he had exception, and that the vassal should owe subjection to a superior not of his own choosing.] 4. *Escheat* and *forfeiture*, being two different modes by which the relation between the lord and vassal might be dissolved. The first was where

Therefore as the attornment is the tenant of particular estate to the alienor is his consent the latter's tenure was in general essential to the validity of the alienation of reversion. but necessity for an attornment was abolished by a Statute of Queen Anne 4. Anne. c.

(*p*) Bract. lib. ii. tr. 1, c. 16, s. 8.

(*q*) Wright’s Tenures, 30.

the tenant in possession of a feud not granted for life only, but transmissible by hereditary descent, died without leaving any heir behind him upon whom, according to the terms of the original grant, the feud could any longer descend; in which case it reverted to the lord, that is, the gift, being determined, resulted back to the giver. The second case (that of forfeiture) occurred where the tenant committed some act in violation of his duty towards his lord, such as rendered him unfit to be longer trusted as a vassal; and the effect of this was that his interest in the feud became forfeited, and returned to the lord, as for a breach of that condition of fidelity on which the grant was made (*r*).

[Feuds, as we have seen, did not originally extend beyond the life of the first vassal; but in process of time they were universally extended to his *sons*, or perhaps to such one of them as the lord should name; and in this case the form of the donation was strictly observed: for if a feud was given to a man and his *sons*, all his sons succeeded him in equal portions; and, as they died off, their shares reverted to the lord, and did not descend to their children, or even to their surviving brothers, as not being specified in the donation (*s*). But when such a feud was given to a man and his *heirs*, in general terms, then a more extended rule of succession took place; and when the feudatory died, his male descendants *in infinitum* were admitted to the succession. When any such descendant, who thus had succeeded, died, his male descendants were also admitted in the first place: and, in defect of them, such of his male collateral kindred as were of the blood or lineage of the first feudatory, but no others. For this was an unalterable maxim in feudal succession, that “none was capable of inheriting a feud but such as was of the blood of, that is, lineally descended from, the first feudatory” (*t*). And the descent, being thus confined to males,

(*r*) Wright's Tenures, 44.

(*t*) Ibid. 183.

(*s*) Wright, *ubi sup.* 17.

[originally extended to all the males alike ; all the sons, without any distinction of seniority, succeeding to equal portions of the father's feud.] But this was found upon many accounts inconvenient, particularly by dividing the services, and thereby weakening the strength of the feudal union ; and, moreover, *honorary* feuds, or titles of nobility, had been gradually introduced, which were not of a divisible nature, but could only be inherited by the eldest son (*u*) ; and, at length, in imitation of these last, *military* feuds (or those we are now describing) began also in most countries to descend, according to the rule of primogeniture, to the eldest son, in exclusion of all the rest (*x*).

[These were the principal and very simple qualities of the genuine or original feuds, which were all of a military nature, and in the hands of military persons ; though the feudatories being under frequent incapacities of cultivating and manuring their own lands, soon found it necessary to commit parts of them to inferior tenants, obliging the latter to such returns, or *reditus*—that is to say, rents—in services, corn, cattle, or money, as might enable the chief feudatories to attend to their military duties without distraction. And by these means the feudal polity was greatly extended, these inferior feudatories (who held what are called in the Scots law “rerefiefs”) being under similar obligations of fealty, to do suit of court, to answer the stipulated renders or rent-services, and to promote the welfare of their immediate superiors or lords (*y*). But this at the same time demolished the antient simplicity of feuds ; and an inroad being once made upon their constitution, it subjected them, in course of time, to great varieties and innovations. Feuds began to be bought and sold, and deviations were made from the old fundamental rules of tenure and succession, which were held no longer sacred, when the feuds themselves no longer continued to

(*u*) Feud. ii. 55.

(*y*) Ibid. 20.

(*x*) Wright, ubi sup. 32.

[be purely military. Hence these tenures began now to be divided into *feoda propria et impropria*, proper and improper feuds; under the former of which divisions were comprehended such, and such only, of which we have before spoken, and under that of improper or derivative feuds were comprised all such as did not fall within the other description; such, for instance, as were originally bartered and sold to the feudatory for a price; such as were held upon base or less honourable services, or upon a money rent, in lieu of military service; such as were in themselves alienable, without mutual licence; and such as might descend indifferently either to males or females. But where a difference was not expressed in the creation, such new-created feuds did in all respects follow the nature of an original, genuine and proper feud (z).

The feudal polity of which we have here presented an outline was not received, at least not universally received, in England, till the reign of William the Norman (a); it is reasonable indeed to believe that even in the times of the Saxons,—who were a swarm from what Sir William Temple calls the same Northern hive,—something similar to it was in use, yet not so extensively, nor attended with all the rigour that was afterwards imported by the Normans: for the Saxons were firmly settled in this island at least as early as the year 600;] and it was not until the eleventh or twelfth century that feuds arrived to their full vigour and maturity, even on the continent of Europe (b). Moreover, [the introduction of the feudal tenures into England by King William was not effected immediately after the Conquest, nor by the mere arbitrary will and power of the Conqueror; but was gradually established by the Norman barons and others, in such forfeited lands as they received from the gift of the Conqueror; and it was

(z) Wright's Tenures, 36.

(a) Spelm. Gloss. 218; Bract. l. 2, c. 16, s. 7.

(b) Hallam's Middle Ages, vol. i.

p. 192, 7th ed. Blackstone fixes A.D. 800, as the period of the full maturity of the feudal system, and he cites Craig, l. 1, t. 4.

[afterwards universally consented to by the great council of the nation, long after his title was established. Indeed, from the prodigious slaughter of the English nobility at the battle of Hastings, and the fruitless insurrections of those who survived, such numerous forfeitures had accrued, that the Conqueror was able to reward his Norman followers with very large and extensive possessions; and their regard for the feudal law, under which they had long lived, together with the king's recommendation of this policy to the English, as the best way to put themselves on a military footing, and thereby to prevent any future attempts from the continent, were probably the reasons that prevailed to effect its universal establishment here by law. And, though the time of this great revolution in our landed property cannot be ascertained with exactness, yet there are some circumstances that may lead us to a probable conjecture concerning it; for we learn from the Saxon Chronicle (*c*), that in the nineteenth year of King William's reign an invasion was apprehended from Denmark; and the military constitution of the Saxons being then laid aside, and no other introduced in its stead, the kingdom was wholly defenceless; which occasioned the king to bring over a large army of Normans and Bretons, who were quartered upon every landowner, and greatly oppressed the people. This apparent weakness, together with the grievances occasioned by a foreign force, might co-operate with the king's remonstrances, and the better incline the nobility to listen to his proposals for putting themselves in a posture of defence; for, as soon as the danger was over, the king held a great council to inquire into the state of the nation (*d*); the immediate consequence of which was the compiling of the great survey called Domesday Book, which was finished in the next year: and

(*c*) A.D. 1085.

(*d*) "*Rex tenuit magnum concilium, et graves sermones habuit cum*

suis proceribus de hac terrâ; quo modo incoleretur, et a quibus hominibus."—Chron. Sax. ib.

[in the latter end of that very year the king was attended by all his nobility at Sarum, where all the principal landholders submitted their lands to the yoke of military tenure, became the king's vassals, and did homage and fealty to his person (e). This may possibly have been the era of formally introducing the feudal tenures by law; and perhaps the very law, thus made at the council of Sarum, is that which is still extant, and couched in these remarkable words—"Statuimus, ut omnes liberi homines fœdere et sacramento affirmant, quod intra et extra universum regnum Angliæ Wilhelmo regi domino suo fideles esse volunt; terras et honores illius omni fidelitate ubique servare cum eo, et contra inimicos et alienigenas defendere" (f). The terms of this law, as Sir Martin Wright has observed, are plainly feudal (g); for, first it requires the oath of fealty, which made, in the sense of the feudists, every man that took it a tenant or vassal; and, secondly, the tenants obliged themselves to defend their lord's territories and titles against all enemies foreign and domestic. But what clearly evinces the legal establishment of this system, is another law of the same collection, which exacts the performance of the military feudal services as ordained by the general council. "*Omnes comites, et barones, et milites, et servientes, et universi liberi homines totius regni nostri prædicti, habeant et teneant se semper bene in armis et in equis, ut decet et oportet; et sint semper prompti et bene parati ad servitium suum integrum nobis explendum et peragendum, cum opus fuerit; secundum quod nobis debent de feodis et tenementis suis de jure facere, et sicut illis statuimus per commune concilium totius regni nostri prædicti*" (h).

It is probable that, by thus consenting to the introduc-

(e) "*Omnes prædria tenentes, quotquot essent notæ melioris per totam Angliam, ejus homines facti sunt, et omnes se illi subdidere, ejusque facti sunt vasalli, ac ei fidelitatis juramenta præstiterunt, se contra alios quoscun-*

que illi fidos futuros."—Chron. Sax. A.D. 1086.

(f) Wilkins's Leg. Anglo-Sax. LL. Guil. Con. c. 52.

(g) Tenures, 66.

(h) Wilkins's Leg. ubi sup. c. 28.

[tion of feudal tenures, our English ancestors meant no more than to put the kingdom in a state of defence by establishing a military system, and to oblige themselves, in respect of their lands, to maintain the king's title and territories with equal vigour and fealty, *as if* they had received their lands from his bounty upon these express conditions, as pure, proper, beneficiary feudatories. But whatever their meaning was, the Norman interpreters, skilled in all the niceties of the feudal constitutions, and well understanding the import and extent of the feudal terms, gave a very different construction to this proceeding; and thereupon took a handle to introduce not only the rigorous doctrines which prevailed in the Duchy of Normandy, but also such fruits and dependencies, such hardships and services, as were never known to other nations; as if the English had, in fact as well as in theory, owed everything they had to the bounty of their sovereign lord (*i*).

Our ancestors, therefore, who were by no means beneficiaries, but had barely consented to this fiction of tenure from the crown as the basis of a military discipline, with reason looked upon these inflictions as grievous impositions and arbitrary conclusions from principles that, as to them, had no foundation in truth (*k*). However, the Conqueror, and his son William Rufus, kept up with a high hand all the rigours of the feudal doctrines; but their successor, Henry the first, found it expedient, when he set up his pretensions to the crown, to promise a restitution of the laws of King Edward the Confessor, or antient Saxon system; and accordingly, in the first year of his reign, granted a charter, whereby he gave up the greater grievances, but still reserved the fiction of feudal tenure, for the same military purposes which engaged his father to introduce it (*l*). But this charter was gradually

(*i*) Spelm. of Feuds, c. 28.

(*k*) Wright's Tenures, 81.

(*l*) Wilkins's Leges Anglo-Sax.
LL. Hen. 1, c. 1.

[broken through, and the former grievances were revived and aggravated by himself and succeeding princes; till, in the reign of King John, they became so intolerable, that they occasioned his barons or principal feudatories to rise up in arms against him; and thus at length produced the famous great charter at Running-mead, which, with some alterations, was confirmed by his son Henry the third (*m*).] And, though the immunities granted by King John (especially as his charter was finally altered, in its last edition, by Henry the third,) are very greatly short of those granted by Henry the first, they were justly esteemed at the time a vast acquisition of English liberty. And although, by reason of the alteration of tenures,—which principally took place, as we shall presently see, in the reign of Charles the second,—many of these immunities may now appear, to a common observer, of much less consequence than they really were when granted; this, properly considered, will show, not that the acquisitions under John were small, but that those under Charles were greater. [And from hence also arises another inference; that the liberties of Englishmen are not mere infringements of the king's prerogative, extorted from our princes by taking advantage of their weakness, but a restoration of that antient constitution of which our ancestors had been defrauded by the art and finesse of the Norman lawyers, rather than deprived of by the force of the Norman arms.]

The general introduction of strict feudal principles into this country, as above explained, gave rise to that fundamental maxim of the law of England which still prevails, that all land belonging to any subject is *holden* of some

(*m*) The charter granted by King John received confirmation, with some not inconsiderable variations, in the first, second, and ninth years of Henry's reign. The last of these (the Magna Charta, consisting of thirty-seven chapters, printed un-

der 25 Edward 1, in our present Statute Book), has never received any alterations. But Sir E. Coke reckons thirty-two instances wherein it has been solemnly ratified. (Hallam's Mid. Ages, vol. ii. p. 452, 7th ed.)

superior, and either mediately or immediately of the sovereign (*n*) ; for in this realm, according to Sir E. Coke, we have not *allodium* (*o*). And as all lands in England are holden, they are consequently called *tenements*, the possessors thereof *tenants*, and the manner of their possession a *tenure* (*p*). Where the tenure was of the sovereign immediately, it was said to be *in capite*, or in chief ; and this was of two kinds, either *ut de honore* (where the land was held of the king as the proprietor of some honour, castle, or manor), or *ut de coronâ* (where it was held of him in right of the crown itself) ; and it is to the latter kind that the term of tenure *in capite* was more especially applied (*q*). But the holding might also be mediate, that is, in the way of subinfeudation ; [for such tenants as held under the king immediately, when they granted out portions of their lands to inferior persons, became also lords with respect to those inferior persons, as they were still tenants with respect to the king : and, thus partaking of a middle nature, were called *mesne* or middle lords. So that if the king granted a manor to A., and A. granted a portion of the land to B., now B. was said to hold of A., and A. of the king ; or in other words, B. held his lands immediately of A., but mediately of the king. The king therefore was styled lord *paramount* ; A. was both tenant and lord, or was a *mesne lord* ; and B. was called tenant *paravail*, or the lowest tenant (*r*).

This distinction of mediate or immediate tenancy ran through all the different sorts of tenure, which we shall here proceed severally to consider.

There subsisted among our ancestors four principal

(*n*) Co. Litt. by Harg. 93 a, 1 a, 1 b, 65 a.

(*o*) Ib. 64 a, n. (1).

(*p*) Co. Litt. ubi sup. 1 b ; 2 Bl. C. 59.

(*q*) It seems that when tenure *in capite* was mentioned generally, it was understood to apply to a tenure

ut de coronâ and not *ut de honore*. (Co. Litt. 108 a ; 2 Inst. 64 ; Mag. Char. c. 31 ; 1 Edw. 3, st. 2, c. 13 ; 1 Edw. 6, c. 4 ; F. N. B. 175 ; Bro. Alien. 11 ; Wright's Ten. 163. But see Co. Litt. by Harg. 108 a, n. (3).)

(*r*) 2 Inst. 296.

[species of lay tenures, to which all others may be reduced: and the grand criteria of these were the natures of the several services or renders that were due to the lords from their tenants. The services, in respect of their quality, were either *free* or *base*; in respect of their quantity and the time of exacting them, they were either *certain* or *uncertain*. *Free* services were such as were not unbecoming the character of a soldier, or a freeman, to perform; as to serve under his lord in the wars, to pay a sum of money, and the like. *Base* services were such as were fit only for peasants, or persons of a servile rank; as to plough the lord's land, to make his hedges, to carry out his dung, or other mean employments. The *certain* services, whether free or base, were such as were stinted in quantity, and could not be exceeded on any pretence; as, to pay a stated annual rent, or to plough such a field for three days. The *uncertain* depended upon unknown contingencies; as to do military service in person, or pay an assessment in lieu of it, when called upon; or to wind a horn whenever the Scots invaded the realm; which are free services: or to do whatever the lord should command; which is base, or villein service.]

The various combinations of these services gave rise to the various kinds of lay tenure. Of these Bracton (who wrote under Henry the third) seems to give the clearest and most compendious account of any author antient or modern; and of this, the following is an outline or abstract. "Tenements are of two kinds, frank-tenement and villenage. And of *frank-tenements* some are held freely, in consideration of homage, and *knight-service*; others in *free-socage* with the service of fealty only, or with fealty and homage, according to some authorities" (s). And, again, "Of *villenages* some are pure, others privileged. *Pure villenage* is where a man holds upon terms of doing whatsoever is commanded of him,

“nor knows in the evening what is to be done in the morning, and is always bound to an uncertain service. There is also another kind of villenage holden of the king, from the time of the Conquest, which is called *villein-socage*, and which is *villenage*, but of a *privileged* sort. Such tenants of the king’s demesnes have the privilege that they cannot be removed from the land while they do the service due; and these villein-socmen are properly called *glebæ ascriptitii*. They perform villein services, but such as are certain and determined” (*t*). This account, illustrated as it is by other authorities, proves that there antiently existed (as before remarked) four principal kinds of lay tenure: and that they were as follows—*servitium militare*, that is knight-service, or in law-French, *chivalry* or *service de chivaler*, answering to the *fief d’haubert* of the Normans,—where the service was free, but uncertain (*u*): *liberum socagium* (free socage), where the service was not only free, but certain: *purum villenagium* (pure villenage), where it was base in its nature, and uncertain: and lastly, *villenagium privilegiatum* (or villein socage), where it was base but certain; and this last seems principally to have prevailed among those who are above described as “tenants of the king’s demesnes.”

The four kinds of tenure above enumerated, however, in process of time were described as only three, viz. knight-service, free socage, and *copyhold*; which last comprises both the species of villenage to which Bracton refers. These three subsisted in England till the middle of the seventeenth century, and the two last subsist to this day. We will now examine a little into the character of each.

First, as to *knight-service*, otherwise called tenure by

(*t*) Bract. l. 4, c. 28, § 5.

called “*fief d’haubert*” in the *Mirror* (c. 2, § 27).

(*u*) Spelm. Gloss. 219. Tenure by “knight-service,” is expressly

chivalry. [This was the most universal, and esteemed the most honourable species of tenure, and it differed in very few points from a pure and proper feud, being entirely military in its character. To make this holding, it was necessary that the tenement in point of quantity should amount to twelve ploughlands (*x*); which was called a knight's fee, *feodum militare* (*y*); and the value of which is stated in 1 Edw. II. at £20 per annum (*z*). And he who held this proportion of land (or a whole fee) by knight-service, was bound to attend his lord to the wars for forty days in every year, if called upon (*a*); which attendance was his *reditus* or return, his rent or service for the land he claimed to hold. If he held only half a knight's fee, he was only bound to attend twenty days, and so in proportion (*b*). And there is reason to apprehend, that this service was the whole that our ancestors meant to subject themselves to; the other fruits and consequences of this tenure being fraudulently superinduced, as the regular (though unforeseen) appendages of the feudal system.]

This tenure had all the marks of a strict and regular feud: it was granted by words of pure donation, *dedi et concessi* (*c*); was transferred by investiture or delivering corporal possession of the land, usually called "livery of seisin;" and was perfected by homage and fealty (*d*).] It also drew after it the following consequences, some of which, as we have seen, were ordinary feudal incidents, and therefore in general observance, not in England only, but throughout a large portion of the continent.

(*x*) 2 Inst. 596. A ploughland, *carucata terræ*, was as much as one plough could plough in a year. (Co. Litt. 69 a.)

(*y*) Inst. ubi sup.

(*z*) Ibid.; Co. Litt. ubi sup.

(*a*) Mr. Selden contends that a knight's fee did not consist of land of a fixed extent or value, but was

as much as the king was pleased to grant, upon the condition of having the service of one knight. (Tit. of Hon. p. 2, c. 5, ss. 17 and 26.)

(*b*) Litt. § 95.

(*c*) Co. Litt. 9.

(*d*) Co. Litt. 64 a, 67 b, 68 a, n. (1).

1. oath of fealty.
2. liability to forfeiture on failure to perform services.
3. escheat.
4. quit rent.
5. relief.
6. suit of court (in manors).
7. tithes (rectory).

1. In tenure by chivalry (or knight-service), the land on the death of the tenant passed by *descent* to his heir, for the practice of granting feuds *jure hæreditario* has been in use amongst us ever since the Norman Conquest (*e*); and in this descent sons succeeded before daughters, and an elder son before a younger (*f*).

2. If the heir in chivalry was under the age of twenty-one, being a male, or fourteen, being a female, the lord was entitled to the *wardship* of the heir, and was called the guardian in chivalry (*g*). This wardship consisted in having the custody of the body and lands of such heir, *without any account of the profits*, till the age of twenty-one in males, and fourteen in females. For the law supposed the heir-male unable to perform knight-service till twenty-one: but as for the female, Sir E. Coke remarks, that at the age of fourteen she might govern an household, and marry a husband, who could do knight's service. The lord therefore had no wardship, if at the death of the ancestor the heir-male was of the full age of twenty-one, or the heir-female of fourteen; yet, if she was then under fourteen, the lord might not only keep her in ward till she attained that age, but if she remained unmarried, he might keep her land in his custody two years longer by virtue of the statute of Westm. I., 3 Edw. I., c. 22 (*h*).

[This wardship, so far as it related to land, though it was not, nor could be, part of the law of feuds, so long as they were arbitrary, temporary, or for life only; yet, when they became hereditary, and did consequently often descend upon infants, who by reason of their age could neither perform nor stipulate for the services of the feud, does not seem upon feudal principles to have been

(*e*) Hist. Eng. Law, by Reeves, vol. i. p. 36.

(*f*) Hale's Hist. C. L. c. 11.

(*g*) *Wardship* and *marriage* were not ordinary feudal incidents, but

nearly peculiar to England and Normandy. (Hallam, *Mid. Ages*, vol. ii. pp. 429, 215; vol. i. p. 190, 7th edit.)

(*h*) Litt. s. 103; 2 Inst. 204.

[unreasonable. For the wardship of the land, or custody of the feud, was retained by the lord, that he might out of the profits thereof provide a fit person to supply the infant's services, till he should be of age to perform them himself: and, if we consider the feud in its original import, as a stipend, fee or reward for actual service, it was not hard that the lord should withhold the stipend, so long as the service was suspended: though undoubtedly to our English ancestors, where such a stipendiary donation was a mere supposition or figment, it appeared to carry abundance of hardship; and accordingly the charter of Henry the first took this custody from the lord, and ordained that the custody, both of the land and of the children, should belong to the widow or next of kin—an immunity, however, which did not long continue.

The wardship of the body was a consequence of the wardship of the land; for he who enjoyed the infant's estate was the properest person to educate and maintain him in his infancy: and also in a political view, the lord was most concerned to give his tenant suitable education, in order to qualify him the better to perform those services which in his maturity he was bound to render.

When the male heir arrived to the age of twenty-one, or the heir female to that of sixteen, they might sue out their livery or *ousterlemain*; that is, the delivery of their lands out of their guardian's hands (*i*). For this they were obliged to pay a fine, namely, half a year's profits of the land; though this seems expressly contrary to *Magna Charta* (*k*). However, in consideration of their lands having been so long in ward, they were excused all the reliefs; and the king's tenants all the primer seisins, also to be hereafter mentioned (*l*). In order to ascertain the profits that arose to the crown by these first fruits of tenure, and to grant the heir his livery, the itinerant justices, or justices in eyre, had it formerly in charge to

(*i*) Co. Litt. 77 a.

(*l*) Litt. ubi sup.

(*k*) 25 Edw. 1, c. 3.

[make inquisition concerning them by a jury of the county, commonly called an *inquisitio post mortem* (*m*); which was instituted to inquire (at the death of any man of fortune) the value of his estate, the tenure by which it was holden, and who, and of what age, his heir was; thereby to ascertain the relief and value of the primer seisin, or the wardship and livery accruing to the king thereupon,—a proceeding which came in process of time to be greatly abused, one of the accusations against Empson and Dudley, in the reign of Henry the seventh, having been that by colour of false inquisitions, they compelled many persons to sue out livery from the crown, who by no means were tenants thereunto (*n*). And afterwards a court of wards and liveries was erected, for conducting the same inquiries in a more solemn and legal manner (*o*).

When the heir thus came of full age he was to receive the order of knighthood, and was compellable to take it upon him, or else pay a fine; for, in these heroical times, no person was qualified for deeds of arms and chivalry who had not received this order, which was conferred with much preparation and solemnity; and we may plainly discover the footsteps of a similar custom, in what Tacitus relates of the Germans, who, in order to qualify their young men to bear arms, presented them in a full assembly with a shield and lance; which ceremony is supposed to have been the original of the feudal knighthood (*p*). This prerogative of compelling the vassals to be knighted, or to pay a fine—as expressly recognized in parliament by the statute *de Militibus*—was used as an expedient for raising money by many of our best princes, particularly by Edward the sixth and Queen Elizabeth (*q*);

(*m*) Hoveden, sub Rich. 1.

(*n*) 4 Inst. 198.

(*o*) St. 32 Hen. 8, c. 46; 33 Hen. 8, c. 22.

(*p*) “*In ipso concilio vel principum aliquis, vel pater, vel propinquus, scuto framedæque juvenem ornant. Hæc*

apud illos toga, hic primus juventæ honos: ante hoc domus pars videntur; mox reipublicæ.”—De Mor. Germ. c. 13.

(*q*) Statute (*incerti temporis*) 1 Edw. 2, st. 1 (Ruff.).

[and yet the same prerogative was the occasion of much murmuring when put in force by Charles the first: among whose many misfortunes it was that neither himself nor his people were able to distinguish between the arbitrary stretch and the legitimate exercise of the prerogative; and eventually among other concessions made by that unhappy prince, he divested himself also of this prerogative, which was accordingly abolished by statute 16 Car. I. c. 20.]

3. But there was yet another species of authority which the guardian exercised over his infant ward; viz. the right of *marriage*, which signifies the power of disposing of the ward in matrimony (*r*). For the guardian might tender to his infant tenant, when of the age of fourteen, a suitable match without *disparagement*, or inequality; and this the infant, if a male, could not refuse and marry elsewhere, without forfeiting *double* the value which the lord might have obtained for the alliance, *duplicem valorem maritaggi*; nor could a female ward refuse, without entitling her guardian to hold her lands by way of penalty, till she attained the age of twenty-one. And even without tender of a match, the lord was entitled in every case, on the ward's coming of age, to the single value which he might have obtained for his or her marriage (*s*). [This seems to have been one of the greatest hardships of our antient tenures. There were indeed substantial reasons why the lord should have the *restraint* and *control* of his wards' marriages, especially of his female wards, because of their tender years, and the danger of such female wards intermarrying with the lord's enemy (*t*): but no tolerable pretence could be assigned why the lord should have the *sale* or *value* of the marriage. Nor indeed is this claim of strictly feudal origin; the most probable account of it

(*r*) See Co. Litt. 88, n. (11), by Harg.; Hist. of Eng. Law, by Reeves, vol. 1, p. 116.

(*s*) Lord Darcy's case, 6 Rep. 70 b; Palmer's case, 5 Rep. 126 b; Co. Litt. 82 a.

(*t*) Bract. l. 2, c. 37, s. 6.

[seeming to be this: that by the custom of Normandy the lord's consent was necessary to the marriage of his *female* wards; a custom which was introduced into England, together with the rest of the Norman doctrine of feuds (*u*). And it is likely that the lords usually took money for such their consent, since, in the charter of Henry the first, the king engages for the future to take nothing for *his* consent; which also he promises in general to give, provided such female ward were not married to his enemy. But this among other beneficial parts of that charter being disregarded, and guardians still continuing to dispose of their wards in a very arbitrary unequal manner, it was provided by King John's great charter, that heirs should be married without disparagement, the next of kin having previous notice of the contract (*x*); or, as it was expressed in the first draft of that charter, "*ita maritentur ne disparagentur, et per consilium propinquorum de consanguinitate suâ*" (*y*). But these provisions in behalf of the relations were omitted in the charter of Henry the third: wherein the clause stands merely thus—" *hæredes maritentur absque disparagatione*" (*z*): meaning certainly, by *hæredes*, heirs female, as there are no traces before this to be found of the lords claiming the marriage of heirs male (*a*); and Glanvil expressly confines it to heirs female (*b*). But the king and his great lords thenceforward took a handle (from the ambiguity of this expression) to claim them both, *sive sit masculus sive fœmina*, as Bracton more than once expresses it (*c*): and also, as nothing but disparagement was restrained by *Magna Charta*, they thought themselves at liberty to make all other advantages that they could (*d*). And afterwards this right of selling the ward in marriage, or else receiving the price or value of it, was expressly de-

(*u*) Gr. Cust. 95.

(*x*) Cap. 6, edit. Oxon.

(*y*) Cap. 3.

(*z*) Ib. 6.

(*a*) The words *maritare* and *mari-*

tagium seem *ex vi termini* to denote the providing of a husband.

(*b*) L. 7, cc. 9 and 12, and l. 9, c. 4.

(*c*) L. 2, c. 38, s. 1.

(*d*) Wright's Tenures, 97.

[clared by the statute of Merton (*e*); which is the first direct mention of it perhaps to be met with, in our own or any other law.

4. The tenant in chivalry was also liable to *aids*. These in England were principally three: First, to ransom the lord's person, if taken prisoner; a necessary consequence of the feudal attachment and fidelity; insomuch that the neglect of doing it, whenever it was in the vassal's power, was, by the strict rigour of the feudal law, an absolute forfeiture of his estate (*f*). Secondly, to make the lord's eldest son a knight: a matter that was formerly attended with great ceremony, pomp, and expense. This aid could not be demanded till the lord's heir was fifteen years old, or capable of bearing arms (*g*); the intention of it being to breed up the eldest son and heir apparent of the seignior to deeds of arms and chivalry, for the better defence of the nation. Thirdly, to marry the lord's eldest daughter, by giving her a suitable portion; for daughters' portions were in those days extremely slender, few lords being able to save much out of their income for this purpose: nor could they acquire money by other means, being wholly conversant in matters of arms; nor, by the nature of their tenure, could they charge their lands with this, or any other incumbrances. From bearing their proportion to these aids, no rank or profession was exempted: and therefore even the monasteries, till the time of their dissolution, contributed to the knighting of their founder's male heir (of whom their lands were holden) and the marriage of his female descendants (*h*). And one cannot but observe, in this particular, the great resemblance which the lord and vassal of the feudal law bore to the patron and client of the Roman republic (*i*); between whom also there subsisted a mutual fealty, or engagement of defence and protection. For, with regard to the matter of aids, there

(*e*) 20 Hen. 3, c. 6.

(*f*) Feud. 1. 2, t. 24.

(*g*) 2 Inst. 233.

(*h*) Philip's Life of Pole, l. 223.

(*i*) Maine's Antient Law, p. 313.

[were three which were usually raised by the client ; viz. to marry the patron's daughter ; to pay his debts ; and to redeem his person from captivity (*k*).

But in addition to these antient feudal aids, the tyranny of lords by degrees exacted more and more ; as, aids to pay the lord's debts (probably in imitation of the Romans), and aids to enable him to pay aids or reliefs to his superior lord ; though, from these last, the king's tenants *in capite* were, from the nature of their tenure, excused, as they held immediately of the king, who had no superior.] To prevent this abuse, King John's *Magna Charta* ordained, that no aids be taken by the king of his tenants *in capite* without consent of parliament, nor in any wise by inferior lords, save only the three antient ones above mentioned (*l*). But this provision was omitted in Henry the third's charter, and the same oppressions were continued till the twenty-fifth year of Edward the first, when the statute called *Confirmatio Chartarum* was enacted ; which in this respect revived King John's charter, by ordaining that none but the antient aids should be taken. These ordinances, however, related to the species of aids only ; the quantity of each aid was provided for by other statutes. King John's charter indeed ordered, that all aids taken by inferior lords should be reasonable (*m*) ; as well as that the aids taken by the king of his tenants *in capite* should be settled by parliament (*n*). But aids were never completely adjusted till the statute Westm. I. (3 Edw. I.) c. 36, and 25 Edw. III. stat. 5, c. 11, the former of which fixed the aid of a mesne (or inferior) lord, for making his eldest son a knight, or marrying his eldest daughter, at twenty shillings, that is to say, the supposed twentieth part of the annual value

(*k*) "*Erat autem hæc inter utrosque officiorum vicissitudo—ut clientes ad collocandas senatorum filias de suo conferrent ; in æris alieni dissolutionem gratuitam pecuniam erogarent ; et ab hostibus in bello captos redime-*

rent."—Paul Manutius de Senatu Romano, c. 1.

(*l*) Caps. 12, 15.

(*m*) Ib. 15.

(*n*) Ib. 14.

of every knight's fee: and the latter statute did the same with regard to the king's tenants *in capite*. The other aid, for ransom of the lord's person, being not in its nature capable of any certainty, was on that account never ascertained.

5. [The tenant in chivalry was liable besides to *relief*, provided he were of full age on his accession. This was looked upon, very justly, as one of the greatest grievances of tenure: especially when, at the first, it was merely arbitrary and at the will of the lord; so that, if he pleased to demand an exorbitant relief, it was in effect to disinherit the heir (*o*). The English ill brooked this consequence of their new-adopted policy; and therefore William the Conqueror by his laws *ascertained* the relief, by directing, in imitation of the Danish heriots, that a certain quantity of arms and habiliments of war should be paid by the earls, barons, and vavasours respectively; and if the latter had no arms, they should pay 100*s.* (*p*). William Rufus broke through this composition, and again demanded arbitrary uncertain reliefs, as due by the feudal laws; thereby in effect obliging every heir to purchase anew or *redeem* his land (*q*): but his brother, Henry the first, by the charter before mentioned, restored his father's law: and ordained that the relief to be paid should be according to the law so established, and not an arbitrary redemption (*r*). But afterwards, when, by an ordinance in the twenty-seventh year of Henry the second, called the "assize of arms," it was provided that every man's armour should descend to his heir, for defence of the realm; and it thereby became impracticable to pay these acknowledgments in arms, according to the laws of the Conqueror; the composition was universally accepted of 100*s.* for every

(*o*) Wright's Tenures, 99.

(*p*) Wilkins's Leges Anglo-Sax.

LL. Guil. Con. cc. 22, 23, 24.

(*q*) 2 Roll. Abr. 514.

(*r*) "*Hæres non redimet terram suam sicut faciebat tempore fratris mei, sed legitima et justa relevatione relevabit eam.*" — Text. Roffens. cap. 34.

[knight's fee, as we find it ever after established. But reliefs were only payable if the heir at the death of his ancestor had already attained his full age of one and twenty years (s).

6. The tenant in chivalry was also liable to the payment of *primer seisin*; which, however, was a burthen only incident to the king's tenants *in capite* (t). It was a right which the king had, when any of his tenants *in capite* died seised of a knight's fee, to receive of the heir, (provided he were of full age,) one whole year's profits of the lands, if they were in immediate possession; and half a year's profits, if the lands were in reversion expectant on an estate for life (u). This seems to be little more than an additional relief, but grounded upon this feudal reason; that, by the antient law of feuds, immediately upon the death of a vassal the superior was entitled to enter and take seisin or possession of the land, by way of protection against intruders till the heir appeared to claim it and receive investiture, during which interval the lord was entitled to take the profits; and unless the heir claimed within a year and a day, it was by the strict law a forfeiture (x). This practice, however, seems, in England, not to have long obtained, if ever, with regard to tenure under inferior lords; but as to tenure *in capite*, the *prima seisin* was expressly declared, under Henry the third and Edward the second, to belong to the king by prerogative, in contradistinction to other lords (y). The king was entitled to enter and receive the whole profits of the land, till livery was sued, which suit being commonly made within a year and a day next after the

(s) Glanv. l. 9, c. 4; Litt. § 112.

(t) *Primer seisin* seems not to have been an ordinary feudal incident, though in France the lord might enter on the lands and possess them for a year if the heir could not pay the relief.—Hallam,

Mid. Ages, vol. i. p. 183 (7th edit.).

(u) Co. Litt. 77 a.

(x) Feud. l. 2, t. 24.

(y) Stat. Marl. (52 Hen. 3) c. 16; *Prerogativa Regis* (17 Edw. 2), c. 3.

[death of the tenant, in pursuance of the strict feudal rule, therefore the king used to take, as an average, the *first fruits*, that is to say, one year's profits of the land (*z*). And this afterwards gave a handle to the popes—who claimed to be feudal lords of the Church—to claim, in like manner, from every clergyman in England the first year's profits of his benefice, by way of *primitiv* or first fruits.]

7. The tenant in chivalry, on arriving at the full age of twenty-one, had the power of *aliening* his land, or part thereof; but this alienation was originally by way of subinfeudation only (*a*); and it was not until the statute of *Quia Emptores* (18 Edw. I. st. 1) that he acquired the full power of alienation *inter viros*; and under that statute the land required to be held by the vendee of the same lord of whom the vendor had himself held it previously; and the tenant had no power of aliening it by testamentary disposition.

8. If the tenant in chivalry held *in capite* he was compelled on aliening his land to pay a *fine*; for if he aliened without obtaining a licence, it became a question whether the land was not absolutely forfeited (*b*). [But this severity was mitigated by the statute 1 Edward III. c. 12, which declared, that in such a case the lands should not be forfeited, but a reasonable fine be paid to the king. Upon which statute it was settled, that one-third of the yearly value should be paid for a licence of alienation; but if such tenant presumed to aliene without a licence, a full year's value should be paid (*c*).] If, however, the tenant did not hold *in capite*, but of a mesne lord, no fine on alienation seems to have been exacted.

9. The estate of the tenant in chivalry was liable to the incidents of *escheat and forfeiture*. These were feudal incidents attaching in full force to the tenure in chivalry,

(*z*) Staundf. Prerog. 12.

Bl. Com. p. 161.

(*a*) Wright's Tenures, p. 154;
Co. Litt. by Harg. 43 a, n. (2); 2

(*b*) 2 Inst. 66.

(*c*) Ibid. 67.

and were attended besides with a severity which seems to have been peculiar to England (*d*), namely, that by *attainder* (as it was termed) of treason or felony the tenant not only forfeited his land, but his blood was held to be corrupted or stained; whereby every inheritable quality was entirely blotted out and abolished, so that no land could thereafter be transmitted from him or through him in a course of descent.

These were the principal qualities, fruits, and consequences of the tenure by knight-service properly so-called: a tenure which was created, as Sir Edward Coke expressly testifies, for a military purpose (*e*): viz. for the defence of the realm by the king's own principal subjects. There were also some other species of knight-service, improperly so called, because the service or render was of a free and honourable nature, and equally uncertain as to the time of rendering it as that of knight-service proper, and also because they were attended for the most part with similar fruits and consequences; [*e.g.*, the tenure by *grand serjeanty, per magnum servitium*, whereby the tenant was bound, instead of serving the king *generally* in his wars, to do some special honorary service to the king in person; as to carry his banner, his sword, or the like (*f*); or to be his butler, champion, or other officer, at his coronation (*g*). This tenure was in most other respects like knight-service (*h*); only the tenant was not bound to pay aid (*i*), or escuage (*h*); and, while tenant by knight-service paid five pounds for a relief on every knight's fee, the tenant by grand serjeanty paid one year's value of his land, were it much or little (*k*); moreover, none could hold by grand serjeanty, save of the king only. There was also

(*d*) Hallam, *Mid. Ages*, vol. i.
 p. 188, 7th ed.; 2 *Bla. Com.* 254.

(*e*) 4 *Inst.* 192.

(*f*) *Co. Litt.* by Harg. 108 a,
 n. (1).

(*g*) *Litt. s.* 153.

(*h*) *Ib.* s. 158.

(*i*) 2 *Inst.* 233.

(*k*) *Litt. s.* 154.

[another tenure in the nature of knight's-service, called tenure by *cornage*, the distinctive feature in which was the service of winding a horn (*cornu*) when the Scots or other enemies entered the land, in order to warn the king's subjects of this invasion; and when this tenure was held immediately of the king (*l*), it was a species or sub-variety of grand serjeanty (*m*).

These services, both of chivalry and of grand serjeanty, besides being uncertain as to their quantity or duration, were also all of them personal services, to be performed in the first instance by the tenants themselves; but the personal attendance growing troublesome, the tenants found various means of evading or compounding it; first, by sending others in their stead, and afterwards by making a pecuniary satisfaction to the lords in lieu of it, which pecuniary satisfaction came at last to be levied by assessment, at so much for every knight's fee, and therefore was called *scutagium*, or *servitium scuti*, *scutum* being then a well-known Latin denomination for money; it was called, in our Norman-French, *escuage*,—being indeed a pecuniary, instead of a military, service (*n*). This *escuage*, or pecuniary payment in lieu of personal service, appears to have been first taken in the fifth year of Henry the second, on the occasion of his expedition to Toulouse; and it soon afterwards became universal; for we find, that from about this period, when our kings went to war, they levied scutages or assessments on their tenants, that is, on all the landholders of the kingdom, to defray their expenses, and to hire troops: and these assessments, which appear at first to have been arbitrarily levied at the king's mere pleasure, were latterly subjected to the control of parliament, like all other imperial taxes, King John, by his *Magna Charta*, consenting that no scutage should

(*l*) Co. Litt. 107 a.

(*m*) Litt. s. 156.

(*n*) Littleton, Coke, and Bracton. Harg. 68 b, 73 a, n. (2), 74 a, render it the "service of the shield."⁽¹⁾

i.e. of arms, being a compensation for actual service; see Co. Litt. by



[be imposed without consent of parliament (*o*),—a provision which, although omitted in Henry the third's charter (*p*), where we only find that scutages or escuages should be taken as they were used to be taken in the time of Henry the second, that is, in a reasonable and moderate manner, yet afterwards, by the statute 25 Edward I., and many subsequent statutes, was again restored; and thenceforward no escuage could be levied but by consent of parliament (*q*).

By reason of this degeneracy of knight-service into escuage all the advantages of the feudal institution were destroyed; for instead of forming a national militia, composed of gentlemen bound by their interest, their honour, and their oaths to defend their king and country, the tenure of knight-service became simply and purely a means of raising money to pay an army of mercenaries. In the mean time, the families of all our nobility and gentry groaned under the other intolerable burdens incident to the service, which had been introduced by the subtlety of the Norman lawyers, that is to say, in addition to the escuage before mentioned, there were the *aids* payable to the king or lord paramount, whenever his eldest son was to be knighted, or his eldest daughter was to be married, or his own person was to be ransomed; also, the heir, on the death of his ancestor, if he was then of full age, was plundered of the first emoluments arising from his inheritance, by way of *reliefs* and *primer seisins*; and, if he was then under age, he was plundered of the whole of his estate during infancy; and as Sir Thomas Smith very feelingly complains (*r*), he had also to pay half a year's profits as a fine for suing out *livery*, and the price or value of his *marriage*, or twice that value if he refused such wife as the lord, his guardian, tendered him without disparagement, and married elsewhere; and as if to make

(*o*) "*Nullum scutagium ponatur in regno nostro, nisi per commune consilium regni nostri.*"—Cap. 12.

(*p*) Cap. 37.

(*q*) Old Ten. tit. Escuage.

(*r*) Commonw. l. 3, c. 5.

[his poverty more completely splendid, he had then to assume the expensive honour of *knighthood*; and when, by reason of all these charges and payments, his fortune was so shattered and ruined, that perhaps he was obliged to sell his patrimony, he had not even that poor privilege allowed him, without paying an exorbitant fine for a *licence* to alienate it.

A slavery so complicated, and so extensive as this, called aloud for remedy, in a nation that boasted of its freedom. Palliatives were from time to time applied by successive acts of parliament, which assuaged some temporary grievances, till at length the humanity of King James the first consented (though the plan proceeded not to effect) to abolish them all, in consideration of a proper equivalent (*s*),—in like manner as he had formed a scheme for removing the feudal grievances of heritable jurisdictions in Scotland; a change which at a later period was carried into execution by the statute 20 George II. c. 43 (*t*). The equivalent suggested by King James was an annual fee-farm rent inseparably annexed to the crown, and assured to the inferior lords, payable out of every knight's fee, within their respective seigniories,—an expedient having much to recommend it, over the hereditary excise, which was eventually adopted as the equivalent for these feudal burdens, all which (having during the Usurpation been discontinued) were destroyed at one blow by the statute 12 Car. II. c. 24, which enacts, that the court of wards and liveries, and all wardships, liveries, primer seisins, and ousterlemains, values and forfeitures of marriage, by reason of any tenure of the king or others, shall be totally taken away:—that all fines for alienations, tenures by homage, knight-service, and escuage, and also aids for marrying the daughter or knighting the son, and all tenures of the

(*s*) 4 Inst. 202.

(*t*) Dalrymp. of Feuds, 292. By another statute of the same year (20 Geo. 2, c. 50), the tenure of

ward-holding (equivalent to the knight-service of England) was abolished in Scotland.

[king *in capite*, shall be likewise taken away:—and that all sorts of tenures, held of the king or others, shall be turned into free and common socage, save only tenures in frankalmoign, copyholds, and the honorary services (without the slavish part) of grand serjeanty,—a statute, which was a greater acquisition to the civil property of this kingdom than even *Magna Charta* itself; since that only pruned the luxuriances that had grown out of the military tenures, and thereby preserved them in vigour; but the statute of King Charles the second extirpated the whole, and demolished both root and branches.

Secondly, as to *Free Socage*, otherwise called Freehold. This is the second kind of tenure which we proposed to consider, and into which, by the statute just mentioned, all tenures by knight-service were, as we have seen, converted. Socage, in its most general signification, denoted a tenure by any certain and determinate service, in which respect it is by our antient writers constantly put in opposition to chivalry, or knight-service, where the render was uncertain. Thus Bracton: “If a man holds by rent in money, without any escuage or serjeanty, *id tenementum dici potest socagium*; but if you add thereto any royal service, or escuage, to any the smallest amount, *illud dici poterit feodum militare*” (u). So too the author of Fleta: “*ex donationibus, servitia militaria vel magnæ serjantie non continentibus, oritur nobis quoddam nomen generale, quod est socagium*” (x). Littleton also defines it to be, where the tenant holds his tenement of the lord by any certain service, in lieu of all other services; so that they be not services of chivalry, or knight-service (y). The service must therefore be certain, in order to denominate it socage: as to hold by fealty and 20s. rent; or, by homage, fealty and 20s. rent; or, by homage and fealty without rent; or, by fealty and certain corporal service, as ploughing the

(u) L. 2, c. 16, s. 9.

(y) S. 117.

(x) Ibid. s. 9.

[lord's land for three days; or by fealty only, without any other service: for all these are tenures in socage (z).

But, as formerly shown on the authority of Bracton, socage is of two sorts: *free-socage*, where the services are not only certain but honourable; and *villain-socage*, where the services, though certain, are of a baser nature. Such as hold by the former tenure are called in Glanvil and other subsequent authors, by the name of *liberi sokemanni*, or tenants in free-socage (a). Of this tenure we are now to speak; and this, both in the nature of its services, and the fruits and consequences appertaining thereto, was always by much the most free and independent species of any.] It is of a strongly feudal character indeed, being created by words of pure donation and livery of seisin,

(z) Litt. ss. 117, 118, 119. As to the etymology of the term *socage*, it is derived by Littleton, Lord Coke, and others, from the French word *soc*, a ploughshare; its services being supposed to have consisted formerly of those of husbandry only, though changed in process of time to a pecuniary rent; (see Co. Litt. by Harg. 86 a, n.; Wright's Ten. 144.) On the other hand, this term is considered by Somner and Blackstone as originating in the Saxon *soc*, which signified any franchise or privilege (though more especially one of jurisdiction); *socage* being distinguished from other tenures by the great privilege of fixed and ascertained services (see 2 Bl. Com. p. 80). The opinion of Bracton, as one of the earliest authorities on the subject, would be entitled to great weight were it more decidedly expressed. "*Dici poterit socagium a socco, et inde tenentes socmanni, eo quod deputati sunt, ut videtur, tantummodo ad culturam, et quorum cus-*

todia et maritagia ad propinquiores parentes jure sanguinis pertinebant."

—Bract. c. 35. This leans, though somewhat doubtfully, towards the derivation from the *plough*; but in another part of his work he speaks of the tenure called *socagium villanum* in a way that rather tends to assign to *socagium* the meaning of *privileged tenure*. "*Est etiam genus villenagii, &c. quod dicitur socagium villanum, et quod est villenagium sed tamen privilegiatum.*" As to *socmanni*, it may be remarked that they are frequently mentioned in Domesday Book; and in Hallam's Mid. Ages (vol. ii. pp. 386, 481, 7th edit.) they are supposed to have been derived from the superior class of Anglo-Saxon *ceorls*. It is stated, however, that they were perfectly exempt from all marks of villenage, both as to persons and estates; and they are considered as "the root of a noble plant, the free socage tenants, or English yeomanry."

(a) Glanv. l. 7, c. 3.

and invariably attended with the obligation of fealty at the least, (even where no other service was rendered,) and with all the incidents attaching to feuds in general, and yet falling far short of the severity of the tenure in chivalry, not only as being certain in its services, but also as being comparatively mild in some of its fruits and consequences, as will appear from the following enumeration of the incidents of free-socage tenure.

1. The law of inheritance is the same in socage tenure as in tenure by knight-service, although antiently the law of primogeniture did not apply to the free-socage tenure (*b*).

2. [Wardship is also incident to tenure in socage, but of a nature very different from that incident to knight-service. For if the inheritance descend to an infant under fourteen, the wardship does not, nor ever did, belong to the lord of the fee; because, in this tenure no military or other personal service being required, there was never any occasion for the lord to take the profits, in order to provide a proper substitute for his infant tenant; but the infant's nearest relation, not being one to whom the inheritance could descend, was to be his guardian in socage, and to have the custody of his land and body till he arrived at the age of fourteen (*c*). At fourteen this wardship in socage ceased; and the heir might oust the guardian, and call him to account for the rents and profits; for at that age the law supposed the infant capable of choosing a guardian for himself (*d*). It was in this particular of wardship, as also in that of marriage, and in the certainty of the render or service, that the socage tenures had so much the advantage of the military ones. But as the wardship ceased at fourteen, there was this disadvantage attending it, that young heirs, being left at so tender an

(*b*) Glanv. l. 7, c. 3; Hale, C. L. c. 11.

(*c*) Co. Litt. by Harg. 88 b, n. (6).

(*d*) Litt. s. 123; Co. Litt. 89 a.

[age to choose their own guardians, might make an improvident choice. Therefore, when, by 12 Car. II. c. 24, almost all the lands in the kingdom were turned into socage tenures, the same statute enacted that it should be in the power of any father to appoint a guardian by deed or will, till his child should attain the age of twenty-one (*e*). And if no such appointment be made, the courts interpose to name a guardian, to prevent an infant heir from improvidently exposing himself to ruin (*f*).

3. "Marriage," or the *valor maritagii*, was not in socage tenure any perquisite or advantage to the guardian, but rather the reverse. For if the guardian caused his ward to marry under the age of fourteen, he was bound to account for the value of the marriage, even though he took nothing for it (*g*). For the law made guardians in socage account, not only for what they *did*, but also for what (but for their own wilful default) they *might*, receive on the infant's behalf; lest by some collusion the guardian should have received the value, and not brought it into account: but the statute of Charles the second having destroyed all values of marriages, this doctrine of course ceased with that statute. At fourteen years of age the ward (till the Act for preventing clandestine marriages) might have disposed of himself in marriage, without any consent of his guardian (*h*).

4. The tenure in socage was subject, of common right, to aids for knighting the lord's eldest son and for marrying his eldest daughter (*i*): but these were fixed by the statute of Westm. I. (cap. 36) at 20s. for every 20l. per annum so held, as in knight-service. These aids, as in tenure by chivalry, were originally mere benevolences, though afterwards claimed as matter of right; but they were all abolished by the same statute 12 Car. II. c. 24.

(*e*) Co. Litt. by Harg. 88 b,
n. (15).

(*f*) Ibid., n. (16).

(*g*) Litt. s. 123.

(*h*) 26 Geo. 2, c. 33; 4 Geo. 4,
c. 76.

(*i*) Co. Litt. 91 a.

[5. Relief was due upon socage tenure, as well as upon tenure in chivalry : but the manner of taking it was very different. The relief on a knight's fee was 5*l.*, or one quarter of the supposed value of the land ; but a socage relief was one year's rent or render, payable by the tenant to the lord, be the same either great or small (*k*) ; and therefore Bracton will not allow this to be properly a relief, but "*quædam præstatio loco relevii in recognitionem domini*" (*l*). And the statute 28 Edw. I. c. 1, declared that a free sokeman shall give *no relief*, but should double his rent after the death of his ancestor, according to that which he had used to pay his lord, and should not be grieved above measure. Again, reliefs in knight-service were only payable if the heir at the death of his ancestor was of full age ; but in socage they were due even though the heir was under age, because the lord had no wardship over him (*m*). The statute of Charles the second reserves the reliefs incident to socage tenures ; and therefore, wherever lands in fee simple are holden by a rent (*scil.* chief rent or quit rent), relief is still due of common right upon the death of a tenant (*n*).

6. Primer seisin was incident to the king's socage tenants *in capite*, as well as to those by knight-service (*o*). But primer seisins were entirely abolished by the statute of Charles the second.]

7. The tenant in socage enjoyed the same right of aliening his lands as the tenant by knight-service ; and, in addition, he might (by custom) aliene his lands even by devise (*p*).

8. Fines for alienation were, apparently, due for lands held *in capite* by socage tenure, as well as in lands held by the tenure of knight-service ; for the statutes that relate to this point, and Sir Edward Coke's comment on them, speak

(*k*) Litt. s. 126.

n. (2).

(*l*) L. 2, c. 37, s. 8.

(*o*) Co. Litt. 77 a.

(*m*) Litt. s. 127.

(*p*) Co. Litt. by Harg. 111 b,

(*n*) Co. Litt. by Harg. 93 a, n. (1).

generally of all tenants *in capite*, without making any distinction (*q*); but all fines for alienation of lands held *in capite* were taken away by the statute of Charles the second.

9. Escheat and forfeiture were equally incident to tenure in socage, as they were to tenure by knight-service; but by modern statutes, which we shall have occasion to notice more particularly hereafter, the antient law of escheat and forfeiture for *felony* has been swept away in respect of every description of tenure (*r*).

Such is the tenure in free socage; being that under which the bulk of real property in this realm is held at the present day; and which is now better known by its modern denomination of *freehold*. But this tenure which we have hitherto discussed only in its proper and ordinary shape, also comprises some particular varieties, viz. *petit serjeanty*, *tenure in burgage*, and *gavelkind*.

It has been explained that grand serjeanty was a variety of the tenure in chivalry, involving honorary services to the king's person, such as carrying his sword or banner; and that these services were reserved by the statute 12 Car. II. c. 24, though the tenure, in other respects, was, by that Act, converted into free socage. [Now *petit serjeanty* bears a great resemblance to grand serjeanty; for as the one is a personal service, so the other (*scil.* *petit serjeanty*) is a rent or render, tending to some purpose relative to the king's person (*s*); and accordingly, *petit serjeanty* is said by Littleton to consist in holding lands of the king by the service of rendering to him annually some small implement of war, as a bow, a sword, a lance, an arrow, or the like (*t*). The services of this tenure being free and certain, it is in all respects free socage (*u*); though being held of the king, it is by way of eminence dignified with the title of *parvum*

(*q*) Co. Litt. 43 a; 2 Inst. 65, 66, 67.

(*r*) Vide post, bk. II. pt. I. c. XII.

(*s*) Co. Litt. 107 a, 108 b.

(*t*) Litt. Ten. s. 159.

(*u*) Wright's Tenures, 160.

[*servitium regis*, or petit serjeanty. And *Magna Charta* regarded it in this light, when it enacted that no wardship of the lands or body should be claimed by the king, in virtue of a tenure by petit serjeanty (*x*).

Tenure in *burgage* is said by Littleton to be but tenure in socage (*y*): and it is where the king or other person is lord of an antient borough, in which the tenements are held by a rent certain (*z*). It is indeed only a kind of town socage, as common socage, by which other lands are holden, is usually of a rural nature. Many of these tenements so held in antient burgage are subject to a great variety of customs: the principal and most remarkable of which is that called *Borough-English*, so named in contradistinction (as it were) to the Norman customs, and which is taken notice of both by Glanvil (*a*), and by Littleton (*b*); viz. that the youngest son, and not the eldest, succeeds to the burgage tenement on the death of his father (*c*). For which Littleton gives this reason, namely, that the younger son, by reason of his tender age, is not so capable as the rest of his brethren to help himself (*d*); and although other authors have given a much stranger reason for it, namely, that the lord of the fee had antiently a right of concubinage (*mercheta* or *marcheta*), with his tenant's wife on her wedding night, whereby the youngest son (and not the eldest son) was more certainly the offspring of the tenant (*e*); still the reason assigned by Littleton is doubtless the true one,—being also in accordance with the practice of the Tartars; among whom, according to Father Duhalde, as also among other northern nations, this custom of descent to the youngest

(*x*) Cap. 27.

(*y*) S. 162; and see Glan. lib. 7,

c. 3.

(*z*) Litt. ss. 162, 163.

(*a*) Lib. 7, c. 3.

(*b*) S. 165.

(*c*) Year-Book, 36 Hen. 6, 20;
Co. Litt. by Harg. 10 a, n. (3),

n. (4); *Muggleton v. Barnett*, 2 H.
& N. 653.

(*d*) S. 211; Year-Book, 8 Edw.
4, 18.

(*e*) 3 Mod. Rep. in pref.; Sel.
Tit. of Hon. 2, 1, 47; Reg. Mag.
1. 4, c. 31.

[son also prevails; for in a nation composed wholly of shepherds and herdsmen, the elder sons, as soon as they are capable of leading a pastoral life, migrate from their father with a certain allotment of cattle, and go to seek a new habitation; and the youngest son, therefore, who continues latest with the father, is naturally the heir of his house, the rest being already provided for; and such youngest son had also the duty cast on him of burying his father, with the proper ceremonial obsequies, and as a recompense for the discharge of such duty, and conditionally upon discharging it, he became his heir (*f*).] Other special customs there are, in different burgage tenures: as that in some the wife shall be endowed of *all* her husband's tenements, and not of the third part only, as at the common law (*g*); and that in others, a man might (as in the Saxon times) dispose of his lands and tenements by will (*h*),—a mode of disposition which, though (as already mentioned) partially permitted in the time of Henry the eighth, did not receive its full development till after the Restoration (*i*).

Gavelkind occurs as of common right in the county of Kent, almost the whole of which is (or at one time was) subject to this tenure (*k*). To account for this it should be recollected, that the Kentish men obtained concessions from the Conqueror, by the effect of which they were permitted to retain their ancient liberties. [And as it is principally here that we meet with the custom of gavelkind, though it was and is to be found in some other parts of the kingdom (*l*), we may fairly conclude that this custom of descent was a part of those liberties. The dis-

(*f*) "*Pater cunctos filios adultos a se pellebat, præter unum, quem heredem sui juris relinquebat.*"—Walsing. Upodigm. Neust. c. 1; Elton's *Origins Eng. Hist.* pp. 184—185.

(*g*) Litt. s. 166.

(*h*) S. 167.

(*i*) Wright's *Tenures*, 172.

(*k*) Year-Book, 36 Hen. 6, 20; *Consuet. Kantæ* (17 Edw. 2, st. 1, c. 16); 32 Hen. 8, c. 29; *Co. Litt.* 140 a.

(*l*) 32 Hen. 8, c. 29; *Kitch. of Courts*, 200; *Co. Litt.* 140 a.

[tinguishing properties of this tenure are principally these :
1. The tenant is of age sufficient to aliene his estate by feoffment at the age of fifteen (*m*). 2. The estate did not escheat in case of an attainder for felony; the maxim being “the father to the bough, the son to the plough” (*n*). 3. In most places where the tenure is gavelkind, the tenant always enjoyed the power of disposing of his lands and tenements by will (*o*). 4. The lands descend, not to the eldest, youngest, or any one son only, but to all the sons together (*p*); which was indeed antiently the most usual course of descent all over England (*q*). These, among other properties, distinguish this tenure in a most remarkable manner: and yet it is said to be only a species of socage tenure, modified by the custom of the country; the lands being holden by suit of court and fealty, which is a service in its nature certain (*r*). Accordingly, by a charter of King John, Hubert, Archbishop of Canterbury, was authorized to *exchange* the gavelkind tenures holden of the see of Canterbury into tenures by knight-service (*s*); and by statute 31 Hen. VIII. c. 3,—an Act for disgaveling the lands of divers lords and gentlemen in the county of Kent,—such lands are directed to be descendible for the future *like other lands which were never holden by service of socage.*]

Thirdly, as to Copyhold. This tenure sprang from the tenure of villenage, as described in its different branches by Bracton; and in order to obtain a clear idea of this subject, it will be necessary to take into consideration the origin and nature of *manors*.

[Manors are in substance as antient as the Saxon constitution, though perhaps antiently differing, in some

(*m*) Lamb. Peramb. 614.

(*n*) Ibid. 634.

(*o*) F. N. B. 198; Launder *v.*
Brooks, Cro. Car. 561.

(*p*) Litt. s. 210.

(*q*) Glanvil, l. 7, c. 3; Hale, C. L.

c. 11; Analect. l. 2, c. 7.

(*r*) Wright's Tenures, 211.

(*s*) Spelm. Cod. Vet. Leg. 355.

[immaterial circumstances, from the manors which exist at this day (*t*); just as we observed of feuds, that they were partly known to our ancestors, even before the Norman Conquest.] It is from the Normans, however, that we derive the particular form of manors with which we are conversant at present (*u*); and, among them, a manor, *manerium*, seems to have been originally a district of ground held by a lord or great personage, who kept to himself such parts of it as were necessary for his own use, which were called *terre dominicales* or *demesne lands* (being those of the *dominus manerii*), and distributed the rest to freehold tenants, to be held of him in perpetuity (*x*). Of the demesne lands, again, part was retained in the actual occupation of the lord, for the purposes of his family; other portions thereof were held in villenage (*y*), of which we shall presently speak more at large; and there was, besides these, a portion which, being uncultivated, was termed the lord's waste, and served for public roads and for common of pasture to the lord and his tenants. Manors were formerly called also baronies, as they still are called lordships; and each baron or lord was empowered to hold a domestic court, called the court baron, for redressing misdemeanors and nuisances within the manor, and for settling disputes regarding property among the tenants. If several of these manors were held, as was frequently the case, under one great baron or lord paramount, his seigniority over them was termed an *honor* (*z*).

[The villenage to which we have referred was a species of tenure neither strictly feudal, Norman, nor Saxon, but mixed and compounded of them all (*a*). Under the Saxon

(*t*) Co. Cop. ss. 2, 10.

(*u*) Ibid. s. 10.

(*x*) Co. Cop. s. 31; Glover *v.* Lane, 3 T. R. 447; Attorney-General *v.* Parsons, 2 Tyrw. 223.

(*y*) Co. Cop. ss. 12, 14; Attorney-General *v.* Parsons, 2 Tyrw. 223.

(*z*) 2 Bl. Com. 91; Co. Litt. by Harg. 108 a, n. (4); Com. Dig. *in tit.* Honor.

(*a*) Wright's Tenures, 215.

[government, there were, as Sir William Temple mentions (*b*), a sort of people in a condition of downright servitude, used and employed in the most servile works, and belonging, both they their children and effects, to the lord of the soil, like the rest of the cattle or stock upon it. These seem to have been those who held what was called the *folkland*, from which they were removeable at the lord's pleasure. On the arrival of the Normans here, it seems not improbable that they who were strangers to any other than a feudal state, might give some sparks of enfranchisement to such wretched persons as fell to their share, by admitting them as well as others, to the oath of fealty: which conferred a right of protection, and raised the tenant to a kind of estate superior to downright slavery, but inferior to every other condition (*c*). This they called villenage, and the tenants villeins, either from the word *vilis*, or else (as Sir Edward Coke tells us) *à villâ*, because they lived chiefly in villages, and were employed in rustic works of the most sordid kind (*d*); resembling the Spartan *helotes*, to whom alone the culture of the lands was consigned; their rugged masters, like our northern ancestors, esteeming war the only honourable employment of mankind.

These villeins, belonging principally to lords of manors, were either villeins *regardant*, that is, annexed to the manor or land; or else they were villeins *in gross*, or at large, that is, annexed to the person of the lord, and transferable by deed from one owner to another (*e*). They could not leave their lord without his permission; and if they ran away, or were purloined from him, they might be claimed and recovered by action, like beasts or other chattels. They held, indeed, small portions of land, by way of sustaining themselves and their families; but it was at the mere will of the lord, who might dispossess them whenever he

(*b*) Introd. Hist. Eng. 59.

(*c*) Wright's Tenures, 217.

(*d*) Co. Litt. 116 a.

(*e*) Litt. s. 181.

[pleased; and it was upon villein services, that is, to carry out dung, to hedge and ditch the lord's demesnes and to do any other the meanest offices (*f*); and their services were not only base, but uncertain, both as to their time and as to their quantity (*g*). A villein could acquire no property, either in lands or goods; but if he purchased either, the lord might enter upon them, oust the villein, and seize them to his own use, unless he contrived to dispose of them again before the lord had seized them; for the lord had then lost his opportunity (*h*).

In many places, also, a fine was payable to the lord, if the villein presumed to marry his daughter to any one without leave from the lord (*i*); and, by the common law, the lord might even bring an action against the husband, for damages in thus purloining his property (*k*). For the children of villeins were also in the same state of bondage with their parents; whence they were called in Latin *nativi*, which gave rise to the female appellation of a villein, who was called a *neife* (*l*). In case of a marriage between a freeman and a neife, or a villein and a free-woman, the issue followed the condition of the father, being free if he was free, and villein if he was villein; contrary herein to the maxim of the civil law, *partus sequitur ventrem*. But no bastard could be born a villein, because, by another maxim of our law, he is *nullius filius*; and as he could *gain* nothing by inheritance, it were hard that he should *lose* his natural freedom by it (*m*). The law, however, protected the persons of villeins, as the king's subjects, against atrocious injuries of the lord; for he might not kill or maim them, without being subject to indictment at the king's suit (*n*).

Villeins might be enfranchised by manumission, which

(*f*) Litt. s. 172.

(*g*) Bracton, l. 4, tr. 1, c. 28.

(*h*) Litt. s. 177.

(*i*) Co. Litt. 140 a.

(*k*) Litt. s. 202.

(*l*) Litt. s. 187.

(*m*) Ibid. ss. 187, 188.

(*n*) Ibid. ss. 189, 194; Co. Litt. 120 b.

[was either express or implied : express, as where a man granted to the villein a deed of manumission (*o*) ; implied, as where a man bound himself in a bond to his villein for a sum of money, granted him an annuity by deed, or gave him an estate in fee, or for life or years (*p*) ; for this was dealing with his villein on the footing of a freeman : giving him an action against his lord, and vesting in him an ownership entirely inconsistent with his former state of bondage. So, also, if the lord brought an action against his villein, this enfranchised him (*q*) ; for as the lord might have a short remedy against him, by seizing his goods (which was more than equivalent to any damages he could recover), the law, which is always ready to catch at anything in favour of liberty, presumed that by bringing this action he meant to set his villein on the same footing with himself, and therefore held it an implied manumission. But, in case the lord indicted him for felony, it was otherwise ; for the lord could not inflict a capital punishment on his villein, without calling in the assistance of the law.

Villeins, by these and many other means, in process of time gained considerable ground on their lords ; and in particular strengthened the tenure of their estates to that degree, that they came to have in them an interest in many places full as good as, in others better than, their lords. For the good nature and benevolence of many lords of manors having, time out of mind, permitted their villeins and their children to enjoy their possessions without interruption in a regular course of descent, the common law, of which custom is the life, now gave them title to hold as against their lords ; *scil.*, on performance of the services, to have and to hold their lands in spite of any determination of the lord's will. For, though in general they were still said to hold their estates at the will of their

(*o*) Co. Litt. 204.

(*p*) Ibid. 204—6.

(*q*) Co. Litt. 208 ; Justinian's Institutes, i, 11, 12,

[lord, yet it was such a will as was agreeable to the customs of the manor; which customs were and are preserved and evidenced by the rolls of the several manor courts in which they are entered, or kept on foot by the constant immemorial usage of the several manors in which the lands lie. And as such tenants had nothing to show for their estates but these customs, and admissions in pursuance of them entered on those rolls, or the copies of such entries witnessed by the steward, they now began to be called tenants by copy of court-roll, or copyhold tenants (*r*).

Thus copyhold tenures (as Coke observes), although very meanly descended, yet come of an antient house (*s*); for, from what has been premised, it appears that copyholders are in truth no other but villeins (*t*); who, by a long series of immemorial encroachments on the lord, at last established a customary right to those estates which before were held absolutely at the lord's will.] By the gradual progress of manumission also (either voluntary or constructive), the *personal* condition of villenage was at length everywhere commuted into freedom. And at the period of the reformation in religion, this change had already become almost complete. [For Sir Thomas Smith testifies, that in all his time (and he was secretary to Edward the sixth) he never knew any villein *in gross* throughout the realm; and the few villeins *regardant* that were then remaining were such only as had belonged to bishops, monasteries, or other ecclesiastical corporations; for, he tells us, that “the holy fathers, monks and friars had in their confessions, and specially in their extreme and deadly sickness, convinced the laity how dangerous a practice it was for one Christian man to hold another in bondage, so that temporal men by little and little, by reason of that terror in their consciences, were glad to manumit all

(*r*) F. N. B. 12.

(*s*) Co. Cop. 32.

(*t*) F. N. B. 12 C.; Wright's Tenures, 224; 3 Reeves's Hist.

Eng. Law, 158, 312; Scriven on Copyholds, 6th ed., by Brown, pp. 12—14.

[“their villeins. But the said holy fathers, with the abbots “and priors, did not in like sort by their own villeins “. . . and so kept their villeins still ” (u).]

Even these remnants of the antient slavery, however, did not long survive, and the last traces of villenage have been entirely obliterated among us for at least two centuries, the last trace of it which we find recorded in our courts being in the fifteenth year of king James the first (x). But the abolition of the personal condition did not involve that of the copyhold tenure, to which it had given birth; and (as before stated) this tenure is one of those expressly reserved by the statute of Charles the second. In most manors, therefore, we still find that species of tenants called copyholders: whose lands, though substantially their own property, are technically part and parcel of the lord's demesnes, and are entered on the rolls of the customary court of the manor, as being held *at the will of the lord* according to the custom. And a manor (when in its proper and perfect state) also still comprises, according to its antient constitution, some freehold tenants holding of the manor in perpetuity (y); also, the court baron (already alluded to), a tribunal whereof the freeholders are the judges, and which is distinct from the customary court of the copyholders, though usually held at the same time and place (z). And here we will observe, that though there should be a failure of freehold suitors to the court baron, and consequently in strictness of law an extinction of the manor; yet the jurisdiction of the customary court (which is for the copyhold tenants) would not be thereby affected (a).

No freehold, it is to be observed, can be now converted into copyhold; of which the chief and most obvious reason is, that the essence of the latter tenure is immemorial

(u) Commonwealth, b. 3, c. 10.

(x) Pigg v. Caley, Noy, 27; 11 Harg. St. Tr. 342.

(y) Glover v. Lane, 3 T. R. 447 a; Melwitch's case, 4 Rep. 26 b.

(z) Co. Litt. 58 a; Co. Cop. s. 31.

(a) Coke's Tracts, 53.

custom (*b*). But, on the other hand, a copyhold is capable of being turned into freehold, either by the lord's conveying to the copyholder the freehold of the particular premises, or by his releasing to him the seignorial estate and rights; or by some other means, express or implied, of *enfranchisement* (*c*).

Copyhold, like the other tenures to which we have adverted, involves the obligation of fealty. A copyhold tenement is *descendible* also, where the custom of the manor so permits, to the *heir*. As for the rule of descent, it is the same (in the greater number of manors) with the ordinary rule in free socage tenure: though in some it is according to the method in gavelkind, and in others again, it is according to that in borough-English (*d*). But an incident almost peculiar to copyholds,—although it is occasionally met with in freehold or customary freehold lands,—is that of *heriots*. These, which are generally supposed to be a Danish custom (*e*), are a render of the best beast or other article (as the custom may be) to the lord, on the death of the tenant. If considered as a relic of villein tenure, there was originally less hardship in it, when all the goods and chattels belonged to the lord, and he might have seized them, even in the villein's lifetime; but it is now commonly considered one of the most oppressive circumstances which attend the modern law of tenures. The *wardship* in copyhold also resembles that in socage; for the lord is not guardian (except by special custom), but the guardianship belongs to the next of kin of the infant to whom the copyhold cannot descend; and he, like the guardian in socage, is accountable to his ward for the profits (*f*). Moreover, copyhold tenure is, in some manors, subject to *relief* of the same nature with that in socage, and used also to be liable to *forfeiture* and

(*b*) *Revell v. Joddrell*, 2 T. R. 424. & N. 653.

(*c*) 1 Watk. Cop. 362; 57 & 58 (e) 2 Bl. C. 97.

Vict. c. 46.

(*f*) 2 Watk. Cop. 101; Co. Litt.

(*d*) *Muggleton v. Barnett*, 2 H. by Harg. 88 b, n. (13).

any alienation. *escheat* (*g*): though (on the other hand) a copyholder cannot *alien* except through the medium of a surrender to the lord: and the land passes not to the alienee till the lord admits him. *Fines*, too, are in general payable to the lord on alienation, and there are other fines upon hereditary descents (*h*). [In some manors, only one of these sorts of fines can be demanded, in some both, and in others neither. They are sometimes arbitrary and at the will of the lord, and sometimes fixed by custom; but, even when arbitrary, the courts, in favour of the liberty of the copyholders, have tied fines down to be *reasonable* in their extent; otherwise they might amount to a disherison of the estate (*i*). No fine, therefore, is allowed to be taken upon descents and alienations (unless in particular circumstances) of more than two years' improved value of the estate (*k*). From this instance, we may judge of the favourable disposition that the law of England (which is a law of liberty) hath always shown to this species of tenants; by removing, as far as possible, every real badge of slavery from them, however some nominal ones may continue.]

The tenure which we have been describing is “copyhold,” commonly so called, or tenure *by copy of court roll at the will of the lord, according to the custom of the manor*; and this, as we have seen, is lineally descended from the antient tenure of *pure villenage*. In the division, however, that we formerly made of lay tenures, the term *copyhold* is to be understood in a larger sense; and as importing, according to the view sanctioned by the highest authorities, every *customary* tenure, that is, every tenure depending on the particular custom of a manor, as opposed to free socage or *freehold* (*l*); which last may now, since

(*g*) *Doe d. Tarrant v. Hellier*, 3 Lord Verulam *v. Howard*, 7 Bing. T. R. 164, 169. 327.

(*h*) 1 Watk. Cop. 286.

(*i*) *Hayward v. Rew*, 6 H. & N. 308.

(*k*) *Astle v. Grant*, Doug. 724;

(*l*) 2 Bl. C. 101; Co. Cop. ss. 17, 32; *Calthorpe*, 51, 54; *Doe v. Huntington*, 4 East, 288; *Doe v.*

Llewellyn, 5 Tyrw. 899.

the abolition of knight-service, be considered as the general tenure of the country (*m*). And copyhold, in this wider application of the term, comprises, besides the principal and common kind that we have just been delineating, two varieties, viz., *antient demesne* and *customary freehold*.

Antient demesne appears to be the same tenure as described by Bracton, sometimes under the name of *privileged villenage*, and sometimes of *villein-socage*. This, he tells us, is such as has been held of the kings of England from the Conquest downwards; and the tenants wherein "*vil-lana faciunt servitia, sed certa et determinata*" (*n*). [And from these circumstances we may collect, that what he here describes is no other than an exalted species of copyhold, subsisting at this day, viz., the tenure in *antient demesne*; to which—as partaking of the baseness of villenage in the nature of its services, and the freedom of socage in their certainty,—he has therefore given a name compounded out of both, and calls it *villanum socagium*.

Antient demesne is a tenure existing in certain manors, which, though now perhaps granted out to private subjects, were in the hands of the Crown at the time of Edward the Confessor, or William the Conqueror; and appear to have been so by the great survey in the Exchequer, called Domesday Book (*o*). The tenants in these crown manors were not all of the same order or degree. Some of them, as Britton testifies, continued for a long time pure and absolute villeins, dependent on the will of the lord (*p*); and such as have succeeded these in their tenures, now differ from common copyholders only in a few points (*q*). Others, again, were in a great measure enfranchised by the royal favour; being only bound, in respect of their lands, to perform some of the

(*m*) Wright's Ten. 138, 139;
Anthony Lowe's case, 9 Rep. 123.

(*n*) L. 4, t. 1, c. 28, s. 5.

(*o*) F. N. B. 14, 16; Crowther v.
Oldfield, Salk. 364.

(*p*) C. 66.

(*q*) F. N. B. 228.

[better sort of villein services of the determinate and certain class; as, to plough the king's lands for so many days, to supply his court with such a quantity of provisions, or other stated services; all of which are now changed into pecuniary rents: and in consideration of these services, they had many immunities and privileges granted to them (*r*); as to try the right of their property in a peculiar court of their own, called a court of antient demesne (*s*), and by a peculiar process, denominated a writ of *right close* (*t*); not to pay toll or taxes (*u*); not to contribute to the expenses of knights of the shire; not to be put on juries; and the like (*x*).]

Manors of antient demesne accordingly comprise, to this day, both copyholders in the proper and common sense of the term, and also such privileged tenants as just described (*y*), who are alone properly called tenants in antient demesne (*z*). As to these last, though their services, like those of pure villeins, were originally base, yet (as appears by the account of them just given) they were distinguished from the latter, in that their services were fixed and determinate; and that they could not be compelled (like pure villeins) to relinquish their tenements at the lord's will, or to hold them against their own; "*et ideo*," says Bracton, "*dicuntur liberi*." Britton, also, on account of such their freedom, calls them *sokemans*, and their tenure *sokemanries*; that is to say, "lands and tenements, which are not held by knight-service, nor by "grand serjeanty, nor by petit, but by simple services; "being, as it were, lands enfranchised by the king or his "predecessors from their antient demesne" (*a*). And the same name is also given them in Fleta (*b*). Tenants in

(*r*) 4 Inst. 269.

(*s*) Doe *v.* Roe, 2 Burr. 1046;

Alden's case, 5 Rep. 103.

(*t*) F. N. B. 11.

(*u*) The Queen *v.* Aylesford, 2 Ell. & Ell. 538.

(*x*) F. N. B. 14.

(*y*) F. N. B. 14, B. 11 M., 12 B.;

Co. Cop. s. 32.

(*z*) Third Real Property Rep. p. 13.

(*a*) C. 66.

(*b*) L. 1, c. 8.

ancient demesne, like common copyholders, require admittance by the lord to perfect their title; and they hold according to the custom of the manor, though not *ad voluntatem domini* (c).

Customary freehold (the other variety to which we referred) exists in many parts of the kingdom. The evidences of title are to be found, as in pure or common copyhold, upon the court rolls; and here, again, the entries declare the holding to be according to the custom of the manor, though it is not expressed to be at the will of the lord (d). The customs of these manors are subject to great variety; but in general the incidents of customary freeholds are similar to those of copyhold lands properly so called.

Mention has hitherto been made of *lay* tenures only; but there is another species of tenure which still subsists, as it was reserved by the statute of Charles the second; and this is of a *spiritual* nature, and it is called the tenure in frankalmoign.

[Tenure in frankalmoign, (*in liberâ eleemosynâ*, or in free alms,) is that, whereby a religious corporation, aggregate or sole, holdeth lands of the donor to it and its successors for ever (e). The services which (prior to the Reformation) such corporations were bound to render for these lands were not certainly defined; but only, in general, to pray for the souls of the donor and his heirs, dead or alive; and therefore they did no fealty, which is incident to all other services but this (f), because this divine service was of a higher and more exalted nature (g). This was

(c) 2 Bl. C. 101; Co. Cop. s. 32.

(d) Co. Cop. ubi sup.; Co. Litt. by Harg. 52 b, n. (1). There is also a kind of customary estate called *tenant right* (said to be peculiar to the north of England), which falls under the general class of copyhold, though distinguished

from the common kind by many of its incidents. (See *Graham v. Jackson*, 6 Q. B. 811; *Passingham*, app., *Pitty*, resp., 17 C. B. 313.)

(e) Litt. s. 133.

(f) Ibid. s. 131.

(g) Ibid. s. 135.

[the tenure by which almost all the antient monasteries and religious houses held their lands; and by which the parochial clergy, and very many ecclesiastical and eleemosynary foundations, hold them to this day (*h*); the nature of the service, however, being, upon the Reformation, altered and made conformable to the doctrines of the Church of England. Tenure in *frankalmoign* is an old Saxon tenure, and it continued under the Norman revolution, through the great respect that was shown to religion and religious men in antient times. Which is also the reason that tenants in *frankalmoign* were discharged of all secular services, except the *trinoda necessitas*, of repairing the highways, building castles, and repelling invasions (*i*); just as the Druids, among the antient Britons, had *omnium rerum immunitatem* (*k*). And, even at present, this is a tenure of a nature very distinct from all the others we have described, being not in the least feudal, but merely spiritual. And, if the service be neglected, the law gives no remedy by distress or otherwise to the lord of whom the lands are holden, but merely a complaint to the ordinary or visitor to correct it (*l*). In this last respect, as also in its services being not certainly defined, it materially differs from another ancient holding of a spiritual nature, called *tenure by divine service* : in which the tenants were obliged to do some special divine services in certain; as to sing so many masses, to distribute such a sum in alms, and the like; which, being expressly defined and prescribed, could with no kind of propriety be called *free* alms; especially as for this, if unperformed, the lord might distrain, without any complaint to the visitor (*m*).] No donation in *frankalmoign* can now (since the statute of *Quia emptores*) be made by a subject; for every grant in *frankalmoign* was for the whole inheritance and to hold

(*h*) Bract. l. 4, tr. 5, cc. 1, 2;
and see Wats. C. L. 373; Plowd.
242; 1 Inst. 94 b.

(*i*) Seld. Jan. 1, 42.

(*k*) Cæsar de Bell. Gall. l. 6, c. 13.

(*l*) Litt. s. 136.

(*m*) Ibid. s. 137.

of the grantor himself (a) ; which since that statute cannot be ; but the tenure is here mentioned because *frankalmoign* is excepted by name in the statute of Charles the second, and it subsists in many instances to this day.

Having made these observations with respect to the different kinds of tenures, it may be now proper to add, that, in proceeding further to investigate the nature and properties of corporeal hereditaments, we shall for the present suppose them held by the ordinary tenure of free socage, that is, *freehold* ; and the reader may dismiss the subject of copyhold from his consideration, till we arrive at a later part of the treatise, when we shall have occasion to devote a separate chapter to the more particular examination of property holden by that tenure (o).

(a) Litt. s. 140 ; Co. Litt. 94 b.

(o) Vide post, bk. II. pt. I. c. XXII.

CHAPTER III.

OF FREEHOLD ESTATES OF INHERITANCE.



THE second point to be considered with regard to corporeal hereditaments is the nature of the *estates* which may be had in such of them as are of free tenure, reserving for subsequent consideration the subject of corporeal hereditaments held in base tenure. An estate in land signifies such interest as the tenant hath therein; so that if a man grants all *his estate* in Dale to A. and his heirs, everything that he can possibly grant shall pass thereby (*a*); and estate is called in Latin *status*, signifying the condition or circumstance in which the owner stands with regard to his property (*b*).

And here it is material, in the first place, to remark that some kind of actual interest or ownership is implied in the term; for a *bare possibility*, (such, for example, as the expectation of the eldest son of succeeding, upon his father's decease, to the inheritance of his lands,) will not satisfy the legal idea of an estate (*c*); but a *possibility coupled with an interest*—such, for example, as the possibility of B., which arises on an estate being conveyed to A. for life, and (living C. at his death) then to B. in fee,—may without impropriety be considered as an estate (*d*). Nor will a mere *power* amount to an estate; as if a man by will orders his land to be sold by his executors: for they will,

(*a*) Co. Litt. 345 a.

(*b*) 2 Bl. Com. p. 103.

(*c*) Jones v. Roe, 3 T. R. 93;

Doe v. Tomkinson, 2 Mau. & Sel.
170.

(*d*) 8 & 9 Vict. c. 106, s. 6.

in such a case, take no estate or right or title in or to the land, but only a bare authority over it (*d*) ; and the same may be said of a mere *revocable licence or permission* (in writing or otherwise) to make a certain use of land (*e*).

The leading distinction to which estates are subject is between such as are *legal* and such as are *equitable* (*f*). But it is of legal estate alone (which is the original and primary estate) that we shall have occasion at present to speak : and we purpose to consider it in a threefold view : first, with regard to the *quantity of interest* which the tenant has in the tenement ; secondly, with regard to the *time* at which that quantity of interest is to be enjoyed : and, thirdly, with regard to the *number and connection* of the tenants.

First, with regard to the *quantity of interest* which the tenant has in the tenement, this is measured by its duration and extent. Thus, either the ownership is to subsist in the tenant during his own life, or during the life of another man ; or it is vested in the tenant and his descendants after him ; or it is circumscribed within a certain number of years, months, or days ; or, lastly, it is infinite and unlimited, being vested in the tenant and his representatives for ever. And this occasions the primary division of estates into such as are *freehold*, and such as are *less than freehold*.

A freehold estate—*liberum tenementum*, or frank tenement, as it was formerly called,—is an estate either of inheritance, or for life, in lands of free tenure (*g*) ; and it is material to our proper conception of it to remark, that at the common law, and prior to certain alterations in our system to be hereafter explained, an estate of this descrip-

(*d*) Co. Litt. 265 b ; Co. Litt. 113 a, n. (2).

(*e*) Wood v. Leadbitter, 13 Mee. & W. 838 ; Perry v. Fitzhowe, 8 Q. B. 757 ; Taplin v. Florence, 10 C. B. 764.

(*f*) Sanders on Uses, 8 ; Bac. Us. 77 ; Alpess v. Watkins, 8 T. R. 516 ; Hardr. 469 ; Murley v. Sherren, 8 Ad. & El. 654.

(*g*) Co. Litt. 43 b.

tion in hereditaments corporeal could in general be created or transferred only by the ceremony called *livery of seisin*, attended with proper words of donation; which ceremony consisted, as its name imports, of a solemn delivery of possession; and was in fact the feudal investiture of which we spoke in the last chapter (*h*).

This method (which is still capable of being used) is called a *feoffment*, and the parties between whom it takes place are called the *feoffor* and the *feoffee*. By the common law, the donation with which the livery is accompanied might be merely oral; but, by the Statute of Frauds, (29 Car. II. c. 3,) some instrument in writing, under the signature of the feoffor (or of his agent by writing lawfully authorized), was made essential; and a deed is now required by the statute 8 & 9 Vict. c. 106, for a feoffment in all cases.

It appears by our definition, that estates of freehold may be classed as being either estates *of inheritance*, or estates *not of inheritance* (*i*); and these two kinds will each be considered in their order.

An estate of inheritance is where the tenant is not only entitled to enjoy the land for his own life, but where, after his death without having disposed of it, it is cast by the law upon the persons who successively represent him *in perpetuum* in right of blood, according to a certain established order of *descent*, which we shall have occasion hereafter to explain (*k*). These persons are called his *heirs*, and himself their *ancestor*.

An estate of inheritance is otherwise called a *fee* (*l*).

[The true meaning of the word fee, *feodum*, is the same with that of feud or fief, and in its original sense it is taken in contradistinction to *allodium*; which latter, as we

(*h*) Co. Litt. 49 a; Doe *v.* Taylor,
5 Barn. & Ad. 575.

(*k*) Co. Litt. 237 b.

(*l*) Litt. ss. 1, 9; Flet. b. 5, c. 5,

(*i*) Edward Seymour's case, 10 s. 27.
Rep. 97 b.

[have seen, is a man's own land, which he possesseth merely in his own right, without owing any rent or service to any superior; and *allodium* is property in its highest degree, and the owner thereof hath *absolutum et directum dominium*. But, *feodum*, or fee, is that which is held of some superior, on condition of rendering him service; in which superior, the ultimate property of the land resides. This allodial property no subject in England now has, it being a received and now undeniable principle in the law, that all the lands in England are feudal; that is, are holden mediately or immediately of the crown. The sovereign, therefore, only hath *absolutum et directum dominium* (m); but all lands owned by subjects are in the nature of fiefs, whether derived to them by descent from their ancestors, or purchased for a valuable consideration; for lands cannot come to any man by either of those ways, unless accompanied with those feudal incidents which attended upon the first feudatories to whom the lands were originally granted.

This is the primary sense and acceptation of the word *fee*; but, as Sir Martin Wright very justly observes, the doctrine "that all lands are holden" having been for so many ages a fixed and undeniable axiom, our modern English lawyers do very rarely use the word *fee* in this its primary original sense, in contradistinction to *allodium* or absolute property, with which they have no concern; but generally use it to express the continuance or quantity of the estate (n). A *fee*, therefore, in general, signifies an estate of inheritance (o), being the highest and most extensive interest that a man can have in a feud, *i.e.*, in land; and in no other sense than this is the king said to be seised in fee, he being the feudatory of no man (p).]

(m) "*Prædium domini regis est directum dominium, cujus nullus est author nisi Deus.*"—Co. Litt. 1 b.

(n) Wright's Tenures, 148.

(o) Litt. s. 1; Flet. l. 5, c. 5, s. 27.

(p) Co. Litt. 1 b.

Estates of inheritance are either estates in *fee simple* or estates in *fee tail* (*q*).

I. An estate in fee simple (*r*) is that which a man hath to hold to him and his heirs general, that is, his heirs both lineal and collateral, male and female (*s*); and this is often called an “estate in fee,” without the addition of the word “simple” (*t*); though, as already explained, a “fee” more properly signifies any estate of inheritance. Where a man claims an estate in fee simple in possession in a corporeal hereditament (*u*), the precise technical expression is as follows: that he is “seised in his demesne as of fee” (*in dominico suo ut de feodo*); the words *in dominico*, or “in his demesne,” signifying that he is seised as owner of the land itself, and not merely of the seigniorship or services (*x*): and the words “as of fee” importing that he is seised of an estate of inheritance in fee simple; and also (in reference to the original meaning of the term *fee*) that he is not the absolute or allodial owner, but holds feudally, of a superior lord (*y*).

The quality of being always holden of a superior lord (the nature of which was fully explained in the Chapter on Tenures) is incident to every estate in fee simple belonging to a subject; but the tenure is no longer (as formerly) of the person from whose immediate grant the fee is derived, but of the person to whose seigniorship it has of antient time belonged. This is by the effect of the statute of *Quia emptores* (18 Edw. I. st. 1), which was passed to put a stop to the practice of the subinfeudation of the fee simple; for according to that practice, a new

(*q*) Edward Seymour's case, 10 Rep. 97 b.

(*r*) Co. Litt. 1 a—18 b.

(*s*) Wright's Tenures, 147; Co. Litt. 1 b.

(*t*) Litt. s. 293.

(*u*) Where the subject is incorporeal, or where the estate is ex-

pectant on a precedent freehold, the words “*in his demesne*” are omitted. Com. Dig. Pleader (C. 35).

(*x*) Fleta, l. 5, c. 5, s. 18, s. 26; Bract. l. 4, tr. 5, c. 2, s. 2.

(*y*) 2 Bl. Com. 104.

relation of lord and tenant was, upon each successive alienation of the fee, continually created between the alienor and the alienee; and the latter consequently held of the former, and not of the chief lord under whom the alienor himself held. But this being found prejudicial to the interests of the chief lords, by exposing them to the frequent loss of their escheats, wardships, and marriages, the statute in question was passed for their protection (*z*); directing that, upon all sales or feoffments of land in fee simple, the feoffee shall hold the same, not of his immediate feoffor, but of the next lord paramount, of whom such feoffor himself held; and by the same services (*a*); and the statute extended also to the king's own tenants *in capite*, holding of him *ut de honore*; and as amended by the statute *De Prerogativâ Regis* (*b*), it extended also to the king's tenants *in capite* holding of him *ut de coronâ* (*c*). Since this statute, therefore, a man who would aliene an estate in fee simple, has no longer been able to convey it to be holden of himself; and his grantee will take it to hold of the same seignior to which the fee immediately belonged when the statute passed (*d*),—unless something should have since occurred to alter the tenure. Where, from the lapse of time, no badges of tenure under any subject can now be traced, the land will be considered as holden immediately as well as ultimately of the crown (*e*), and by the service of mere fealty; which is the least and lowest service the law can create (*f*); and which being now never exacted, has become a merely nominal obligation (*g*). But in many instances a private lord can still be shown to be entitled to the immediate seignior; the ultimate one, as formerly remarked, being in all cases vested in the

(*z*) 2 Inst. 66, 500.

(*a*) Ibid. 505.

(*b*) 17 Edw. 2, st. 1, c. 6; 34 Edw. 3, c. 15.

(*c*) Wright's Tenures, 163; Taylor v. Horde, Burr. 108.

(*d*) Bradshaw v. Lawson, 4 T. R.

443.

(*e*) Booth, 135.

(*f*) Co. Litt. 98 a.

(*g*) Co. Litt. by Harg. 68 b, n. (5).

sovereign; and when freeholds properly so called are held of a private lord, they are properly called *antient freeholds*, to distinguish them from the customary freeholds and enfranchised freeholds to be hereafter spoken of in connection with the copyhold lands of manors.

A fee simple is the most extensive estate of inheritance that a man can possess (*h*); it is the entire property in the land (*i*): and to it is attached—as an inseparable incident—the right of *alienation*, to the full extent of the interest which is vested in the tenant himself, or for any smaller estate (*k*). If he alienes to the full extent of his interest, or, in other words, conveys away the fee simple, it follows of course that the alienee takes an estate to himself and his *own* heirs, answerable to that which the original owner had to him and *his* heirs.

[As a general rule, the fee simple or inheritance of lands and tenements is generally vested and resides in some person or other, though divers inferior estates may be carved out of it. As if one grants a lease for twenty-one years, or for one or two lives, the fee simple remains vested in the grantor and his heirs; and after the determination of those years or lives, the land reverts to the grantor or his heirs, who shall hold it again in fee.] Yet sometimes the fee may be in *abeyance*, that is, only in remembrance, intendment, and consideration of the law; there being no person *in esse*, in whom it can vest and abide; though the law considers it as always potentially existing (*l*); and [this may be exemplified in the case of the parson of a church, who hath only an estate therein for the term of his life, and the inheritance remains in

(*h*) Litt. s. 11; Co. Litt. 18 a; Vaughan, 269.

(*i*) Butler's Fearn, p. 13 (note); Co. Litt. 18 a; 2 Saund. 388 b; Machell v. Clarke, Ld. Raym. 779; 2 Inst. 336; Edward Seymour's case, 10 Rep. 97 b.

(*k*) Litt. s. 360; Co. Litt. 223 a; 1 Cr. Dig. 20.

(*l*) Co. Litt. 341 a, 342 b; Litt. 646, 647; Butler's Fearn, p. 360, 9th ed.; 1 Prest. Est. 503; Camoy's Peerage case, 5 Bing. N. C. 763.

[abeyance (*m*). And not only the fee, but the freehold also, may be in abeyance; as, when a parson dies, the freehold of his glebe is in abeyance until a successor is named; and then it vests in the successor (*n*).

The word “heirs” used to be necessary in the grant or donation, in order to make a fee or inheritance; for if the land was given to a man for ever, or to him and his assigns for ever, this vested in him but an estate for life (*o*). This very great nicety about the insertion of the word “heirs” in all donations, in order to vest a fee, was plainly a relic of the feudal strictness, by which it was required that the form of the donation should be punctiliously pursued; or that, as Craig expresses it in the words of Baldus, “*donationes sint stricti juris, ne quis plus donasse præsumatur quam in donatione expresserit*” (*p*). And therefore, as the personal abilities of the donee were originally supposed to be the only inducements to the gift, the donee’s estate in the land extended originally only to his own person, and subsisted no longer than his life; unless the donor, by an express provision in the grant, gave it a longer continuance, and extended it also to his heirs.] But this old rule, after having obtained for centuries, has been at length abolished by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 51, which has enacted that it shall not be necessary to use the word “heirs” in any deed, but it shall be sufficient to say that the conveyance is “in fee simple” or “in fee tail” as the case may be.

Moreover, even the old rule had some exceptions—and particularly it never extended strictly to dispositions *by will*; in which, as they were introduced at a time when the feudal rigour was fast wearing out, a more liberal construction has always been allowed: and therefore, by a devise to a man for ever, or to one and his assigns for

(*m*) Litt. s. 646; Co. Litt. 341 a.

(*n*) Litt. s. 647; Co. Litt. 342 b.

(*o*) Litt. s. 1; Wright v. Dowley,

2 W. Bl. 1185.

(*p*) L. 1, t. 9, s. 17.

ever, or to one in fee simple, the devisee has always been construed to have an estate of inheritance; for the intention of the devisor was sufficiently plain from the words of perpetuity annexed, though he had omitted the legal words of inheritance (*q*). If, however, the devise were simply to a man and “his assigns,” without annexing any words of perpetuity, the devisee was, at one time, held to take only an estate for life; for it did not appear that the devisor intended any more. A new rule of construction, however, has been now provided; for by the Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26), s. 28, it has been enacted, that where any real estate shall (after the passing of that Act) be devised without words of limitation, it shall be construed to pass the whole interest of which the testator had power to dispose, *unless* a contrary intention should appear by the will in question.

Estates in fee simple are ordinarily divided into three sorts (*r*):—1, *fee simple absolute*; 2, *fee simple qualified*; and 3, *fee simple conditional*—a division which relates, it is to be observed, to the *quality*, not the *quantity*, of the estate; for it is laid down by Lord Coke that in the latter respect, both fees qualified and fees conditional are equivalent to fees simple absolute (*s*).

1. The fee simple absolute is free from all qualification,

(*q*) Thus, too (even before the New Wills Act), a devisee of an indefinite estate, if he was charged *personally* with the payment of debts or legacies, was held to take the fee; though it was otherwise if the *estate devised to him* was so charged. (*Manning v. Taylor*, Law Rep., 1 Exch. 235; *Pickwell v. Spencer*, Law Rep., 7 Exch. 105.)

(*r*) In *Edward Seymour's* case (10 Rep. 97 b) estates of inheritance are distributed as follows:—First, they are either *fee simple* or *fee tail*.

Estates in fee simple are either *absolute* (i.e., indeterminate) or *determinable*. Those which are determinable are either *derived out of an estate in fee simple absolute*, or *derived out of an estate in fee tail*. The first of these are created either by way of *condition*, or by way of *limitation*; the first sort being called fees simple *conditional*, the second, fees simple *limited and qualified*. (See also *Walsingham's* case, Plowd. 557; *Willion v. Berkeley*, *ibid.* 241.)

(*s*) Co. Litt. 18 a.

and requires no particular remark; the two others involve considerations of some intricacy.

2. [A qualified fee is such a one as, having a qualification subjoined thereto, must be determined whenever the qualification annexed to it is at an end (*t*). As in the case of a grant to A. and his heirs, *tenants of the manor of Dale*; here, whenever A. or the heirs of A. cease to be tenants of that manor, the grant is entirely defeated. Thus, when Henry the sixth granted to John Talbot, lord of the manor of Kingston-Lisle in Berks, that he and his heirs, lords of the said manor, should be peers of the realm, by the title of barons of Lisle;—in this instance John Talbot had a qualified fee in that dignity, and the instant he or his heirs quitted the seigniorship of this manor, the dignity was at an end (*u*).] Such an estate is a fee simple, because it is limited to the heirs general, and may by possibility endure for ever; yet, as that duration depends upon the concurrence of collateral circumstances, which qualify the donation, it is therefore not an absolute, but a qualified or (as it has occasionally been called) a *base fee* (*x*).

3. A conditional fee seems properly to comprise every fee simple granted upon condition (*y*), but the term is usually understood to refer to that particular species called a conditional fee at common law.

[A conditional fee at common law was a fee restrained in its form of donation to some particular heirs, exclusive

(*t*) Lord Cardigan *v.* Armitage, 2 Barn. & Cress. 202.

(*u*) Co. Litt. 27 a.

(*x*) It is proper to observe, with respect to this use of the term *base fee*, that it has also a more restricted application, viz., to that species of qualified fee which is created where tenant in tail conveys his estate by a conveyance barring his issue, but not the remainderman, to another

and his heirs, and which Lord Coke describes as a determinable fee derived out of an estate tail; and in the Act for the Abolition of Fines and Recoveries, 3 & 4 Will. 4, c. 74, the meaning of the phrase *base fee* is, by express provision, so confined (so far as that statute is concerned).

(*y*) Edward Seymour's case, 10 Rep. 97 b.

[of others : “*donatio stricta et coarctata ; sicut certis hæredibus, quibusdam a successione exclusis*” (z) : as to the heirs of a man’s body, by which only his lineal descendants were admitted, in exclusion of his collateral heirs ; or, to the heirs male of his body, in exclusion both of collaterals and of lineal females also.] We say restrained in the form of donation ; because, in point of legal effect, such a gift was construed by the judges of former days, as conferring not an estate descendible to some particular heirs, but as conferring a fee simple, though a fee simple subject to some condition (a). For they held that a gift to a man and the heirs of his body was a gift upon condition that it should revert to the donor, if the donee had no heirs of his body (b). They therefore called it a fee simple on condition that the donee had issue. So that, as soon as he had any issue born, his estate was supposed by the performance in some sense, or to some intent, of the condition, to become absolute (c) ; at least for these three purposes :—

1. To enable the tenant to aliene the land, and thereby to bar the interest not only of his own issue, but also of the donor in the reversion (d).
2. To subject the tenant to forfeit his estate for treason, which till issue born he was not able to do, except for the period of his own life ; for otherwise the inheritance of the issue, and reversion of the donor, might have been defeated (e).
3. [To empower him to charge the land with rents, commons, and certain other incumbrances, so as to bind his issue (f). And this was thought the more reasonable, because, by the birth of issue, the possibility of the donor’s reversion was rendered more distant and precarious : and his interest seems to have been the only one which the law, as it then stood, was

(z) Flet. 1. 3, c. 3, s. 5.

(a) Nevil’s case, 7 Rep. 34 b.

(b) Stat. *De donis* (13 Edw. 1, Stat. West. Sec. c. 1) ; Willion v. Berkley, Plowd. 241.

(c) Nevil’s case, ubi sup.

(d) Co. Litt. 19 a ; 2 Inst. 333 ;

Doe v. Clark, 5 B. & Ald. 461.

(e) Co. Litt. ubi sup. ; 2 Inst. 334.

(f) Co. Litt. 19 a.

[solicitous to protect, without much regard to the right of succession intended to be vested in the issue.] However, if the grantee survived his issue, and afterwards died without making any alienation, the land by force of the condition reverted to the donor, and therefore the performance of the condition by the birth of issue did not alter the course of descent till alienation in fact took place (*g*). For which reason, in order to subject his land to the ordinary course of descent, the donee of a conditional fee-simple took care to aliene as soon as he had performed the condition by having issue; and, afterwards, by repurchase of the land to obtain a fee simple absolute therein that would descend to his heirs general, according to the course of the common law. And thus stood the old law with regard to conditional fees: a subject of no great practical importance, this kind of gift having been long since construed (as we shall presently see) in a different manner; but, as Lord Coke observes, these things, though they seem antient, are yet necessary to be known; as well for the declaring how the common law stood in such cases, as for the sake of annuities, and such-like inheritances, which are not within the statutes of entail, and therefore remain as at the common law (*h*).

II. The subject of conditional fees leads us, by a natural introduction, to our second general division of estates of inheritance—namely, *estates in fee-tail*, or, as they are more concisely termed, *estates tail*. An estate tail is that which a man hath to hold to him and the heirs of his body, or to him and particular heirs of his body (*i*); being, as to the form of donation, the same kind of estate that we have just been considering under the name of fee-simple conditional; and indeed in that light it was at first contemplated (*k*). But by force of a statute to be pre-

(*g*) Nevil's case, 7 Rep. 34 b; mouth, 7 Taunt. 614.

Willion v. Berkley, Plowd. 247.

(*i*) Co. Litt. 18 b—28 b.

(*k*) Co. Litt. by Harg. 20 a,

(*k*) Willion v. Berkley, Plowd.

n. (3), n. (5); Moore v. Lord Ply- 237.

sently mentioned, and of the judicial construction which that statute received (*l*), another character has been long attached to an estate thus limited—viz. that of an estate *tail*; the incidents or consequences of which are very different from those of a fee-simple conditional. The history of the change is as follows:—

[It was the inconveniences which attended a limited and fettered inheritance which probably induced the judges to give way to the subtle finesse of construction (for such it undoubtedly was), by which a limitation to a man and the heirs (or some particular heirs) of his body, was construed as a conditional estate in fee simple. But, on the other hand, the nobility (who were willing to perpetuate their possessions in their own families), in order to put a stop to this construction of the limitation, procured the statute of Westminster the second (commonly called the statute *De donis conditionalibus*) to be made (*m*); which Act paid a greater regard to the private will and intentions of the donor, than to the propriety of such intentions, or any public considerations whatsoever.] This statute enacted that thenceforth the will of the donor should be observed *secundum formam in cartâ doni expressam*; and that tenements given to a man and the heirs of his body, or to the heirs male of his body, or the like, should, notwithstanding any alienation by the donee, go to his issue, if there were any; or, if issue failed, should revert to the donor or his heirs.

Upon the construction of this act of parliament, the judges determined that, under such a limitation, the donee had no longer a conditional fee simple; but they divided the fee simple into two parts (*n*), vesting in the donee a new kind of particular estate, which they denominated a *fee-tail* (*o*); and leaving in the donor the ultimate fee

(*l*) 2 Inst. 335.

(*m*) 13 Edw. 1 (stat. Westm. Sec.), c. 1 (A.D. 1285).

(*n*) 2 Inst. 335; Willion *v.* Berk-

ley, Plowd. 241; Butler's Fearn, 382 (*n*), 9th edit.

(*o*) The expression *fee-tail*, or *feodum talliatum*, was borrowed from

simple of the land, expectant on the failure of issue of the donee (*p*). And hence it is that Littleton tells us, that tenant in fee-tail is by virtue of the statute of Westminster the second (*q*).

The expectant estate of the donor by virtue of this statute, is considered as of a different nature from the right which belonged, at the common law, to the donor of a fee simple conditional: for his reverter was only in possibility, being dependent on the contingency of the donee's estate determining by force of the condition; but the reversion of the donor of an estate tail is the residue of a fee, and therefore a fixed or vested interest (*r*).

By the express provision of the statute *De donis*, the alienation of the tenant in tail was not to defeat the succession of the issue, or the reversion of the donor and his heirs. Such alienation was not, however, a void act,—for his leases, though liable to be defeated after his death by those claiming under the entail, were in other respects effectual; and if he conveyed his estate to another and his heirs, the alienee took a *base fee*, that is to say, a fee simple to hold as long as the tenant in tail lived or had heirs of his body (*s*). But such fee was determinable at an earlier period, as it might be avoided on the death of the tenant in tail by the entry of his issue (*t*).

the feudists; among whom it signified any mutilated or truncated inheritance; being derived from the barbarous verb *taliare*, to cut; from which the French *tailler* and the Italian *tagliare* are formed.—Spelm. Gloss. ad verb. Feodum; Craigh, l. 1, t. 10, ss. 24, 25.

(*p*) Inst. ubi sup.

(*q*) S. 13.

(*r*) Inst. ubi sup.; Co. Litt. 22 a; Bac. Abr. tit. Remainder and Reversion.

(*s*) Such alienation, though wrongful, did not work a *forfeiture*;

but, if made by certain modes of conveyance, was a *discontinuance*, which (prior to 3 & 4 Will. 4, c. 27) deprived both the issue and the reversioner of their *right of entry*, and left them only to their *right of action*. (Co. Litt. 328 a; 2 Inst. 335.)

(*t*) Co. Litt. by Butler, 331 a, n. (1); Machell v. Clarke, Ld. Raym. 778; Salk. 618, S. C.; Seymour's case, 10 Rep. 97 b; Walsingham's case, Plowd. 557; Goodright v. Shilson, Burr. 1703.

Estates-tail are either *special* or *general*. Tail-general is where lands and tenements are given to one and the *heirs of his body* begotten : and this is called tail-general, because, how often soever such donee in tail be married, his issue, by all and every such marriage, is, in successive order, capable of inheriting the estate tail *per formam doni* (*u*). Tenant in tail-special is where the gift is restrained to the heirs of the donee's body by a particular person ; as where lands and tenements are given to a man and the *heirs of his body, on Mary his now wife* to be begotten ; here no issue can inherit but such special issue as is engendered between them two ; not such as the husband may have by another wife : and therefore it is called a special tail (*x*). And here we may observe that the words of inheritance (to him and his *heirs*) give him an estate in fee ; but they being heirs *of his body*, this makes it a fee-tail ; and the person being also limited on whom such heirs shall be begotten, (*viz. Mary his present wife*,) this makes it a fee-tail special.

[Estates in “general” and “special” tail are further diversified by the distinction of sexes in such entails ; for both of them may either be in tail *male* or in tail *female*. As if lands be given to a man and the *heirs male of his body* begotten, this is an estate in tail male general ; but if to a man and the heirs *female of his body on his present wife* begotten, this is an estate in tail female special. And in case of an entail male, the heirs female shall never inherit, nor

(*u*) Litt. ss. 14, 15.

(*x*) In the particular case where an estate in frankmarriage (*in libero maritagio*) is given to a man on his marriage with the daughter or kinswoman of the donor, such donees are tenants in special tail ; and Blackstone tells us (vol. ii. p. 115) that the word “frankmarriage” *ex vi termini*, not only created an inheritance, but likewise

limited that inheritance, supplying not only words of descent, but of procreation also ; and such donees were liable to no service but fealty ; for a rent reserved thereon would have been void, till the fourth degree of consanguinity were passed between the respective issues of the donor and of the donee (Litt. ss. 19, 20).

[any derived from them; nor *è converso* the heirs male, in case of the gift in tail female (*y*). Thus, if the donee in tail male hath a daughter who dies leaving a son, such grandson in this case cannot inherit the estate tail; for he cannot deduce his descent wholly by heirs male (*z*). And as the heir male must convey his descent wholly by males, so must the heir female wholly by females. And therefore if a man hath two estates-tail, the one in tail male, the other in tail female; and he hath issue a daughter, which daughter hath issue a son; this grandson can succeed to neither of the estates; for he cannot derive his descent either wholly in the male or wholly in the female line (*a*).

As, in a deed, the word *heirs* used to be necessary to create a fee, so, in further imitation of the strictness of the feudal donation, the word *body*, or some other word of procreation (*b*), used to be necessary to make it a fee-tail, and to ascertain to what heirs in particular the fee was limited. If therefore either the words of inheritance or the words of procreation were omitted in the grant, albeit the others were inserted, this would not make an estate-tail. As if the grant were to a man and the *issue of his body*, to a man and his *seed*, to a man and his *children* or *offspring*; all these were only estates for life, for there were wanting the words of inheritance, “his heirs” (*c*).] So, on the other hand, a gift to a man and his *heirs male* or *heirs female*, was an estate in fee-simple, and not in fee-tail; for there were no words to ascertain the body out of which they should issue; which was indispensable to an estate of the latter description (*d*); and every estate in fee, which was not in tail, must of necessity have been and be

(*y*) Litt. ss. 21, 22.

(*z*) Ibid. s. 24; Co. Litt. 25 b.

(*a*) Ibid.

(*b*) Beresford's case, 7 Rep. 40.

(*c*) Co. Litt. 20; Frogmorton v.

Wharrey, 2 W. Bla. 728; 3 Will.

125, 144, S. C.

(*d*) Litt. s. 31; Co. Litt. 7 a; Abraham v. Twigg, Cro. Eliz. 478; Earl of Oxford's case, W. Jones, 105.

fee simple (*e*), as all fees consisted and consist either of one kind or the other; and upon such a limitation as last supposed, heirs both male and female should inherit (*f*); for a descent in fee simple is inconsistent with a restriction to heirs of either sex. But this antient necessity of using both the word *heirs*, and also the word *body*, for the grant of an estate tail, after having obtained for centuries, has been abolished by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 51, which has enacted, that for the creation of an estate tail it shall not be necessary to use the words “heirs of the body,” but it shall suffice to say “in fee tail,” with or without the word *male* or *female*, as may be required. It is to be observed, however, that in last wills and testaments a greater indulgence has always been allowed as to the manner of expounding a donation than in a conveyance *inter vivos*; and therefore an estate tail may be created by a devise to a man and his *seed*, or to a man and his *heirs male*; or by other irregular modes of expression (*g*), provided the words of the will be sufficient to indicate an intention to confer an inheritance, but to restrain it to the descendants of the devisee.

We have seen that lands cannot (since the statute *Quia emptores*) be conveyed in fee simple, to be holden of the grantor; but that the holding must be of him to whose seigniority the fee belongs; but it is otherwise with respect to a gift in tail. For if a tenant in fee simple grants an estate tail out of it, (the reversion remaining in the donor,) the donee in tail shall hold of the donor, by fealty and such other services as may be reserved; or if none be reserved, then by fealty and such other services as the donor himself renders to the next lord paramount (*h*). But the tenure thus created between the donor and the

(*e*) Co. Litt. 27 b.

(*f*) Litt. ubi sup.

(*g*) 2 Bl. Com. p. 115; Co. Litt. 9 b, 27 a; Doe *d.* Jearrad *v.* Bannister, 7 M. & W. 298; Good *v.* Good, 7 El. & Bl. 295.

(*h*) Litt. s. 19; Co. Litt. 23 a, 93 a, 143 a, 68 b, n. (5), by Harg.; 2 Inst. 501, 505; Willion *v.* Berkeley, Plowd. 237; Bingham's case, 2 Rep. 92 b.

donee in tail is described as *imperfect*, whereas that which subsists between the tenant in fee and the chief lord is said to be *perfect* in its kind (*i*).

[Thus much for the nature of estates tail: the establishment of which family law, as it is properly styled by Pigott (*k*), occasioned infinite difficulties and disputes (*l*). Children grew disobedient when they knew they could not be set aside: farmers were ousted of their leases made by tenants in tail; for if such leases had been held valid, then under colour of long leases the issue might have been virtually disinherited: creditors were defrauded of their debts; for if tenant in tail could have charged his estate with their payment, he might also have defeated his issue, by mortgaging it for as much as it was worth; innumerable latent entails were produced to deprive purchasers of the lands they had fairly bought; of suits in consequence of which our antient books are full; and treasons were encouraged; as estates tail were not originally liable to forfeiture longer than for the tenant's life. So that they were justly branded as the source of new contentions and mischiefs unknown to the common law, and almost universally considered as the common grievance of the realm (*m*). But as the nobility were always fond of the statute *De donis*, because it preserved their family estates from forfeiture, there was little hope of procuring a repeal of it by the legislature; and therefore, by the connivance of an active and politic prince, a method was devised to evade it.

Nearly two hundred years intervened between the making of the statute *De donis* and the application of common recoveries to this intent, in the twelfth year of Edward the fourth (*n*); but these were then openly declared by the judges to be a sufficient bar of an estate tail (*o*). For though the courts had, so long before as

(*i*) Co. Cop. s. 31.

(*k*) Com. Recov. 5.

(*l*) Chudleigh's case, 1 Rep. 131 b.

(*m*) Co. Litt. 19 b; Hunt v. Gate-

ley, Moor, 156; Mary Portington's case, 10 Rep. 38.

(*n*) A.D. 1472.

(*o*) Chudleigh's case, 1 Rep. 131; Mildmay's case, 6 Rep. 40.

[the reign of Edward the third, very frequently hinted their opinion that a bar might be effected upon these principles (*p*), yet it never was carried into execution, until Edward the fourth—observing (in the disputes between the houses of York and Lancaster) how little effect attainders had upon traitors protected by the sanctuary of entails—contrived (*q*), that Taltarum's case should be brought before the court (*r*); wherein, in consequence of the principles there laid down, it was in effect determined, that a common recovery suffered by tenant in tail should convert his estate into a fee simple absolute; and bar all persons whatever claiming the estate tail, or any estate ulterior thereto (*s*). What common recoveries were, both in their nature and consequences, and why they were allowed to be a bar to the estate tail, must be reserved to a subsequent inquiry. At present it may suffice to say, that they were fictitious proceedings, introduced by a kind of *pia fraud*, to elude the statute *De donis*; an Act which was found so intolerably mischievous, and which yet one branch of the legislature would not then consent to repeal; and that these recoveries, however clandestinely introduced, afterwards became by long use and acquiescence a most common assurance of lands; and were looked upon as the legal mode of conveyance, by which a tenant in tail might dispose of his lands and tenements, so that no court would suffer them to be shaken or reflected on (*t*).

This expedient having greatly abridged estates tail with regard to their continuance, others were soon invented to strip them of their other privileges. The first of these to be attacked was their freedom from forfeiture for treason.

(*p*) Mary Portington's case, 10 Rep. 37, 38.

(*q*) Pigott, 8.

(*r*) Year Book, 12 Edw. 4, 14, 19; Fitzh. Abr. tit. Faux Recov. 20; Bro. Abr. tit. Recov. in Value, 19; tit. Taile, 36; Hist. Eng. Law, by Reeves, vol. iii. p. 328.

(*s*) Martin *v.* Strachan, 5 T. R. 107, n.; Willes, 449; Taylor *v.* Horde, 1 Burr. 115; Smith *v.* Clifford, 1 T. R. 738.

(*t*) 11 Hen. 7, c. 20; 7 Hen. 8, c. 4; 34 & 35 Hen. 8, c. 20; 14 Eliz. c. 8; 14 Geo. 2, c. 20.

[For, notwithstanding the large advances made by recoveries, in the compass of about threescore years, towards unfettering these inheritances, and thereby subjecting the lands to forfeiture, the rapacious prince then reigning, finding them re-settled in a similar manner to suit the convenience of families, had address enough to procure a statute to be passed (26 Henry VIII. c. 13), whereby all estates “of inheritance,” under which general words estates-tail *in possession* were covertly included, were declared to be forfeited to the king upon any conviction of high treason.

The next attack which they suffered in order of time was by the statute 32 Henry VIII. c. 28; whereby certain *leases* made by tenants in tail not tending to the prejudice of the issue, were allowed to bind the issue in tail, though not the remainderman or reversioner (*u*). But they received a more violent blow, in the same session of parliament, by the construction put upon the statute “of fines” (4 Henry VII. c. 24), by the statute 32 Henry VIII. c. 36; which declared that mode of conveyance called a *fine* (which was another species of fictitious proceeding), when duly levied by tenant in tail, to be a complete bar to him and his heirs claiming under such entail. This was evidently agreeable to the intention of Henry the seventh, whose policy it was (before common recoveries had obtained their full strength and authority) to lay the road as open as possible to the alienation of landed property, in order to weaken the overgrown power of his nobles: but as they, from the opposite reasons, were not easily brought to consent to such a provision, it was therefore couched in his Act under covert and obscure expressions: and the judges, though willing to construe that statute as favourably as possible for the defeating of entailed estates, yet hesitated at giving fines so extensive a power by mere implication, when the statute *De donis* had

(*u*) Co. Litt. 45 b.

[expressly declared that they should *not* be a bar to estates-tail. But the statute of Henry the eighth, when the doctrine of alienation was better received, and the will of the prince more implicitly obeyed than before, avowed and established that intention.] Also, by the 33 Hen. VIII. c. 39, s. 75, estates-tail were rendered liable to be charged for payment of debts due to the king by record or specialty contract; and afterwards (by 21 Jac. I. c. 19, s. 12) they were subjected to be sold for the benefit of the general creditors, if the tenant became *bankrupt*. Also, a tenant in tail might, by 43 Eliz. c. 4, convey the fee simple to a charitable use (x).

But the most extensive and effectual relaxation is that introduced by the Fines and Recoveries Act, 1833 (3 & 4 Will. IV. c. 74); for this enables a tenant in tail, by an ordinary deed of conveyance, provided it be *duly enrolled in chancery* (and now in the central office) within six months after execution, and without any resort to the indirect and operose expedient of a fine or recovery (which the statute wholly abolishes), to aliene the lands entailed in fee-simple absolute, or for any less estate; and thereby either *in toto* or *pro tanto* to bar himself and his issue, as well as all persons having any ulterior interest therein (y). Yet this provision is subject to an important qualification, designed for the protection of family settlements; for in these, it is usual to settle a life estate (which is a freehold interest) on the parent, prior to an estate tail limited to his children; and the nature of a *recovery*, by which alone interests ulterior to such estate tail could formerly be barred, was to make the concurrence of the immediate tenant of the freehold indispensable to the validity of that proceeding. In order, therefore, to continue to the parent (or other prior taker of the life estate) a control of the same general description, the Act provides that where,

(x) *Attorney-General v. Rye*, 2 Vern. 453; Chan. Prec. 16.

(y) 3 & 4 Will. 4, c. 74, s. 15.

under the same settlement which created such estate tail, a prior estate of freehold, or for years determinable with life, shall have been conferred,—it shall not be competent for the tenant in tail to bar any estate taking effect upon the determination of the estate tail, without consent of the person to whom such prior estate was given: who receives for that reason the appellation of *protector of the settlement* (z): the Act also expressly providing that neither a dowress nor a bare trustee shall be the protector (a). But, the object not being to restrain the power of the tenant in tail over the estate tail itself (which he could have barred, before the statute, by *fine*, without any other person's concurrence), his alienation, in the manner prescribed by the Act, is allowed to be effectual even without the consent of the protector, so far as regards the barring of such tenant in tail and his own issue (b).

Even subsequently to the passing of this Act, however, one of the antient and justly obnoxious immunities of the owner of an entailed estate still remained without disturbance, viz. that such estate (save only in the case of his becoming bankrupt) was not liable to his general debts. But this also was removed by the statute 1 & 2 Vict. c. 110, in the year 1838—by the effect of which a man's *entailed estates are now equally liable to satisfy his judgment debts*, as any other estates of which he may be possessed or in which he may have an interest (c); but for this purpose *execution must have issued during the judgment debtor's life*,—a particular respect in which the estate tail still continues (as regards general debts) differently situated to an estate in fee simple. And there is this further difference between them, namely, that a fee tail is not liable at all, whereas a fee simple is expressly made liable, under the statute 3 & 4 Will. IV. c. 104, as legal assets for the payment of debts in an administration of the deceased

(z) 3 & 4 Will. 4, c. 74, s. 22.

(b) 3 & 4 Will. 4, c. 74, s. 31.

(a) Ibid. ss. 26, 27.

(c) 1 & 2 Vict. c. 110, s. 13.

tenant's estate in the Chancery Division or Court of Chancery.

Finally, with reference to *leases* of entailed estates, we may remark that the effect of the statute 3 & 4 Will. IV. c. 74, above referred to, is to enable a tenant in tail in possession to make effectual leases *without* the necessity of enrolment in Chancery, for terms not exceeding twenty-one years, if made at a rack-rent or not less than five-sixth parts of a rack-rent (*d*). And that still more recently, by the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), repealing a number of earlier statutes on the same subject (*e*), it has been enacted, that any person entitled to the possession, or to the receipt of rents and profits under a *settlement* made after 1st November, 1856, either for life, or for a term of years determinable with any life or lives, or for any greater estate (which brings an *estate tail* within the provision), either in his own right, or in right of his wife, may demise the same from time to time (unless the settlement shall contain an express declaration that it shall not be lawful to make such demise), for any term not exceeding twenty-one years, in such form and with such restrictions as in the Act prescribed (*f*). But all these last-mentioned provisions as regards leases by tenants in tail may be regarded as having now lost much of their practical efficiency and value, since the Settled Land Act, 1882 (45 & 46 Vict. c. 38), which enables tenants in tail not only to lease, but also to

(*d*) 3 & 4 Will. 4, c. 74, ss. 15, 40, 41.

(*e*) 19 & 20 Vict. c. 120; 21 & 22 Vict. c. 77; 27 & 28 Vict. c. 45; 37 & 38 Vict. c. 33; and 39 & 40 Vict. c. 30.

(*f*) Sect. 46. In addition to this general provision, the Act contains others (ss. 4, 39) enabling the High Court of Justice to authorize almost any lease, sale, or act in respect of a settled estate which may seem

expedient for the interests of all parties entitled under the settlement, and being such as the settlor himself might have authorized; including permanent improvements. See also 27 & 28 Vict. c. 114 (Improvement of Land Act, 1864); 33 & 34 Vict. c. 56 (Limited Owners' Residences Act, 1870); and 40 & 41 Vict. c. 31 (Limited Owners' Reservoirs and Water Supply Further Facilities Act, 1877).

sell the entailed lands, for any term of years or estate, provided the requisites prescribed by the last-mentioned Act are complied with; and in these cases the deed need not even be enrolled in order to bar the tail; but the last-mentioned Act is of such wide application in the law of real property as to require (and it will hereafter receive) more particular treatment in this volume (*g*).

(*g*) See bk. II. pt. I. c. XXIV.

CHAPTER IV.

OF FREEHOLD ESTATES NOT OF INHERITANCE.



WE are next to consider estates of freehold which are not of inheritance, but *for life* only; and of these, some are *conventional*, and others are merely *legal* (*a*).

I. [Those estates for life are termed *conventional* which are expressly created by some deed or will; and they arise when an estate is limited to a man to hold for the term of his own life, or for that of any other person, or for more lives than one; in any of which cases he is styled tenant for life: only, when he holds the estate by the life of another, he is usually called *tenant pur autre vie* (*b*). These estates for life are, like inheritances, of a feudal nature: and they were for some time the highest estate that any man could have in a feud; for feuds were not, at first, hereditary. They were, accordingly, originally conferred with the same feudal solemnities, the same investiture or livery of seisin, as fees themselves were;] and as in an estate of inheritance in possession, the tenant is said to be “seised in his demesne *as of fee*,” or of “fee-tail,”—so in an estate for life in possession, he is said to be “seised in his demesne *as of freehold*.”

[Estates for life may be created, not only by the express words before mentioned, but also by a general grant, without defining or limiting any specific estate. As if one by deed grants to A. B. the manor of Dale, this makes

(*a*) Wright's Tenures, 190.

(*b*) Litt. s. 56.

[him tenant for life (*c*). For though, as there are no words of inheritance, or *heirs*, mentioned in the grant, it cannot be construed to be a fee, it shall however be construed to be as large an estate as the words of the donation will bear, and therefore an estate for life. Also such a grant at large, or a grant for term of life generally, shall be construed to be an estate for the life of the grantee, in case the grantor hath authority to make such a grant (*d*); for an estate for a man's own life is more beneficial and of a higher nature than for any other life: and the rule of law is, that all grants are to be taken most strongly against the grantor, unless in the case of grants by the crown (*e*).

Such estates for life will, generally speaking, endure as long as the life for which they are granted: but there are some estates for life, which may determine upon future contingencies, before the life for which they are granted expires. As if an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice; in these and similar cases, whenever the contingency happens,—when the widow marries, or when the grantee obtains a benefice,—the respective estates are absolutely determined and gone (*f*). Yet, while they subsist they are reckoned estates for life (*g*); because the time for which they will endure being uncertain, they may by possibility last for life, if the respective contingencies upon which they are to determine do not sooner happen]. And, moreover, in case an estate were granted to a man for his life generally, it might also have determined by his *civil* death; that is to say, as already explained, by his becoming outlawed or attainted.

On the gift of an estate tail we may remember that the donee holds of the donor, by fealty and such other services as may be reserved between them; or if none be reserved, then by fealty, and the same services as are due from the

(*c*) Co. Litt. 42 a, 183 a.

(*d*) Ibid.

(*e*) Co. Litt. 36 a, 183 a.

(*f*) Co. Litt. 42 a; Boraston's case, 3 Rep. 19 a.

(*g*) Co. Litt. 42 a.

donor to the next superior lord; and in like manner, upon a lease for life, a tenure (of the imperfect kind) is thereby created between the lessor and lessee, and the latter will hold of the former, by the nominal obligation of fealty, and such other services as may be reserved; and if no others be reserved, the lessee will hold by fealty only (*h*).

The incidents of an estate for life (whether conventional or legal) are principally the following:—

1. Every tenant for life, unless restrained by covenant or agreement, may of common right take, upon the land demised to him, reasonable estovers or botes, that is, an allowance of wood for fuel, repairs, and the like: the term estovers being derived from the French word estoffer, to furnish; and bote, which is of Saxon derivation, being used by us as synonymous with estovers. And when this allowance is for fuel, it is called house-bote, and sometimes fire-bote; when for making and repairing the instruments of husbandry, plough-bote and cart-bote; when for repairing hedges and fences, it is termed hay-bote or hedge-bote (*i*).

2. While a tenant for life has this privilege of botes, he is, on the other hand, answerable by law for waste, that is, for any spoil or destruction which he does, or allows to be done, to the premises during his tenancy, to the injury of the person entitled to the inheritance (*k*). And there are two kinds of waste; that which is voluntary and that which is permissive; the first by the tenant's voluntary act, as where he pulls down a wall, or cuts down timber (*l*); the other by his default, as by suffering a wall to fall down for want of necessary repair (*m*). Estates for life

(*h*) Co. Litt. 143 a, 23 a, 93 a, 68 b, n. (5), by Harg.; Litt. s. 132.

(*i*) 2 Bl. Com. 35.

(*k*) 2 Bl. Com. 281; 3 Bl. Com. 223; Seagram v. Knight, Law

Rep., 2 Ch. App. 628.

(*l*) Honynwood v. Honynwood, Law Rep., 18 Eq. Ca. 346; Harrison v. Harrison, 28 Ch. Div. 220.

(*m*) Yellowly v. Gower, 11 Exch. 274; Coles v. Courtier, 34 Ch. Div.

are sometimes limited, however, with a clause expressing that the tenant shall hold the land without impeachment of waste, the effect of which is that he is not liable for legal waste of either kind, whether voluntary or permissive; but even in such a case the court of equity interfered to restrain the gratuitous felling of ornamental timber, and any other like unwarrantable and gratuitous injury to the inheritance, although such acts were not, under the circumstances, legal waste at all, but only waste in the view of a court of equity (*n*). And now, by the Judicature Act, 1873, it has been provided that an estate for life, without impeachment of waste, shall not confer, or be deemed to have conferred, on the tenant for life any legal right to commit waste of the description known as “equitable” waste, unless an intention to confer such right shall expressly appear by the instrument creating the estate (*o*).

3. Tenant for life cannot, apart from statute, make leases to bind those in remainder. But a person entitled to the possession or to the receipt of the rents and profits of land under a settlement made after 1st November, 1856, as tenant for life, or for term of years determinable with his life,—either in his own right or in right of his wife,—is now by statute enabled to make an effectual *lease* of the lands (other than of the mansion house and demesnes) for the period of twenty-one years; and also to effect permanent improvements on the land (as by *draining* it, or by erecting thereon a suitable residence for himself), and to charge a portion of the expense on the remainderman or reversioner; all which powers have been confirmed

136; *Davies v. Davies*, 38 Ch. Div. 499; *Avis v. Newman*, 41 Ch. Div. 432.

(*n*) *Herlakenden's case*, 4 Rep. 63 a; *Dowman's case*, 9 Rep. 10 b; *Pyne v. Dor*, 1 T. R. 55.

(*o*) 36 & 37 Vict. c. 66, s. 25, sub-s. (3); *Burgess v. Lamb*, 16 Ves. 174; *Lushington v. Boldero*, 6 Madd. 149; *Morris v. Morris*, 15 Sim. 505.

and enlarged by the Settled Land Act, 1882, hereinafter more particularly discussed (*p*).

4. [Tenant for life, or his representatives, shall not be prejudiced by the determination of his estate, where such determination is sudden and unforeseen. Therefore, if a tenant for his own life sows the lands, and dies before harvest, his representatives shall have the *emblements*, or profits of the crop : for the estate was determined by the act of God ; and *actus Dei nemini facit injuriam* (*q*). The emblements, therefore, are given to compensate for the labour and expense of tilling, manuring, and sowing the lands,—and also for the encouragement of husbandry, which, being a public benefit, ought to have the utmost security and privilege that the law can give. So, if a man be tenant for the life of another, and *cestui que vie*, that is to say, he during whose life the land is held, dies after the corn sown ; the tenant *pur autre vie* shall have the emblements.] The same is also the rule, if a life estate be determined by the act of law ; *e.g.*, where a lease was made to husband and wife during coverture, whereby they acquired a determinable estate for life, and the husband sowed the land ; after which they were divorced ; it was held that the husband should have the emblements ; for the sentence of divorce was the act of law (*r*). [But if an estate for life be determined by the tenant's *own act* (as by forfeiture for waste committed, or if tenant during widowhood should think proper to marry), in these, and similar cases, the tenants having thus determined the estate by their own acts, shall not be entitled to take the emblements (*s*). The doctrine of emblements extends not only to corn sown, but to roots planted, or other annual artificial profit ; though not to fruit trees, grass, and the

(*p*) See bk. II. pt. I. c. XXIV.

(*r*) Oland's case, 5 Rep. 116.

(*q*) Co. Litt. 55 a, 55 b ; Shep. Touch. by Preston, p. 472 ; Cooper v. Woolfit, 2 H. & N. 122.

(*s*) Knevett v. Pool, Cro. Eliz. 461 ; 1 Roll. Abr. 727.

[like, which are not planted annually at the expense and labour of the tenant, but are either a permanent or natural profit of the earth (*t*). For when a man plants a tree, he cannot be presumed to plant it in contemplation of any present profit; but merely with a prospect of its being useful to himself in future, and to future successions of tenants. The right to emblements was extended to the parochial clergy by the statute 28 Hen. VIII. c. 11, s. 6; for a parson may be considered as tenant for his own life.]

5. [A fifth incident to estates for life relates to their under-tenants or under-lessees. For if tenant for life under-let, the lessee, by the common law, has the same, nay greater, indulgences than his lessor. The same,—for the law of estovers and emblements, with regard to the tenant for life, is also law with regard to his under-tenant (*u*): and greater,—for in those cases where tenant for life shall not have the emblements, because the estate determines by his own act, the exception shall not reach his under-lessee. Thus, too, in the case of a woman who holds *durante viduitate*: her taking husband is her own act, and therefore deprives her of the emblements: but if she has leased to an under-tenant, who sows the land, and she then marries, this her act shall not deprive the under-tenant of his emblements (*x*).] And now as regards tenants at a rack-rent—that is, at a rent equal to the full value of their lands—who hold under landlords entitled for life or other uncertain interest, a more ample protection than was afforded by the doctrine of emblements at the common law has been provided by the statute 14 & 15 Vict. c. 25, s. 1 (*y*), by which it has been enacted that where in such cases the lease or other tenancy shall determine by the death or by cesser otherwise of the estate of the landlord, the tenant shall, instead of a claim to emblements, con-

(*t*) Co. Litt. 55 a, 55 b; 1 Roll.

Abr. 728.

(*u*) Co. Litt. 55 b.

(*x*) Ibid.

(*y*) Haines v. Welch, Law Rep.,

4 C. P. 91.

tinue to hold until the expiration of the current year of his tenancy; at which time he shall (without being required or entitled to give or to receive any notice) quit upon the terms of his holding, in the same manner as if his tenancy were determined by effluxion of time or other lawful means during the continuance of his landlord's estate: and the succeeding owner shall be entitled to recover (as the landlord could have done if his interest had continued) a fair proportion of the rent for the period elapsed from the termination of the landlord's interest to the time of the tenant's quitting: and the succeeding owner and tenant respectively shall be entitled (as against each other) to all the benefits, and be subject to all the terms, to which the landlord and tenant respectively would have been entitled or subject, in case the tenancy had determined in manner aforesaid at the expiration of such current year. This provision was made in favour of the lessees of life tenants; but a previous statute had remedied an injustice, to which at common law the representatives of life tenants (being landlords) were on their side exposed. For the lessees of such tenants might, if they had pleased, on the deaths of their lessors, have quitted the premises, and paid no rent to anybody for the occupation of the land since the last quarter-day, or other day assigned for payment of rent,—a most unreasonable advantage (z), and which was put an end to [by 11 Geo. II. c. 19, which enacted that in such a case the executors or administrators of tenant for life, on whose death any demise determined, might recover of the lessee a rateable proportion of the rent, from the last day of payment to the death of the lessor (a).] And by 4 & 5 Will. IV. c. 22, where any demise *in writing* shall determine by the death either of the person making the same (though he may not have been strictly tenant for life), or of the life

(z) Clun's case, 10 Rep. 127.

(a) Mills v. Trumper, Law Rep., 4 Ch. App. 320.

or lives on which he held (*b*);—a proportion of the rent shall, in like manner, be recoverable from the lessee. And now, by the Apportionment Act, 1870 (33 & 34 Vict. c. 35), it has been provided generally, and not merely in reference to life tenants and their under-lessees, that all rents, annuities, dividends, and other periodical payments in the nature of income, (whether reserved or made payable under an instrument in writing *or otherwise*;) shall, like interest on money lent, be considered *as accruing from day to day*; and shall be apportionable (in the absence of an express stipulation to the contrary) in respect of time accordingly; and shall be recoverable by the representatives of the person who would have been entitled to the entire portion, had no such apportionment taken place (*c*).

II. We have next to consider estates for life [of the legal kind, as contradistinguished from the conventional. Now, (1) the first of these legal life estates is that of *tenant in tail after the possibility of issue extinct* (*d*). This happens where one is tenant in special tail, and the person from whose body the issue was to spring dies without issue; or, having left issue, that issue becomes extinct: in either of which cases the tenant in special tail becomes, for the residue of his life, tenant in tail after possibility of issue extinct (*e*); and the law makes use of this long periphrasis in order to give an adequate idea of his estate; for he has no longer an estate of inheritance, or *fee*, seeing that he can have no heirs capable of taking *per formam doni* (*f*); nor yet is he *tenant in tail without issue*, for that would not

(*b*) *Lock v. De Burgh*, 4 De G. & Sm. 470; *Llewellyn v. Rous*, Law Rep., 2 Eq. Ca. 27.

(*c*) *Clive v. Clive*, Law Rep., 7 Ch. App. 433; *Jones v. Ogle*, ib., 8 Ch. App. 192; *Whitehead v. Whitehead*, ib., 16 Eq. Ca. 528; *Capron v. Capron*, ib., 17 Eq. Ca. 288.

(*d*) Co. Litt. 27 b—28 b; *Lewis Bowles's case*, 11 Rep. 79 b; *Williams v. Williams*, 12 East, 209; 15 Ves. 419; *Platt v. Powles*, 2 Mau. & Sel. 65.

(*e*) Litt. s. 32.

(*f*) *Bowles v. Berrie*, 1 Rol. Rep. 184; *Lewis Bowles's case*, 11 Rep. 80.

[have excluded the possibility of future issue ; and lastly, he is not *tenant in tail without possibility of issue*, but he is *tenant in tail after possibility of issue extinct*, which phrase not only takes in the possibility of issue in tail which he once had, but also states that this possibility is now extinguished for ever.

This estate must be created by the act of God ; no limitation, conveyance, or other human act can make it ; *e.g.*, if lands be given to a man and his wife, and the heirs of their two bodies begotten, and they are divorced without issue, they shall neither of them have this estate, but be barely tenants for life, notwithstanding the inheritance once vested in them (*g*).] This estate is, moreover, of an amphibious nature, partaking partly of an estate tail, and partly of an estate for life. For besides the name of tenant in tail, the tenant is so far in the condition of a tenant in tail properly so called, as to be dispunishable for waste (*h*) ; and he formerly possessed some other of the privileges of a tenant in tail, connected with branches of the law which have now become extinct (*i*). But, on the other hand, his estate has always been considered for practical purposes as equivalent to an estate for life only ; and therefore the law permits a tenant in tail of this description, and an ordinary tenant for life, to make mutual alienation of their estates, by that particular method of conveyance called an *exchange* ; which can take place, as we shall see hereafter, only in the case of estates that are equal in their nature (*k*).

(2.) Another estate for life of the legal kind, as contradistinguished from the conventional, is the estate *by the curtesy of England* ; that is to say, the estate which a man has, on the death of his wife, in the lands and tenements of which during the marriage she was seised in fee simple

(*g*) Co. Litt. 28 a.

(*h*) Co. Litt. 27 b ; Whitfield v. Bewitt, 2 P. Wms. 240 ; Williams v. Williams, 12 East, 209.

(*i*) Co. Litt. ubi sup. ; Lewis Bowles's case, 11 Rep. 80 a.

(*k*) As to an exchange, vide post, bk. II. pt. I. c. XVII.

or fee tail; provided always he had issue by her born alive during the marriage, and capable of inheriting her estate (*l*). If the lands, however, be in gavelkind, the rule is so far different that he shall hold no more than a moiety, and that only while he lives unmarried; and, on the other hand, his title in this case attaches whether he has issue born or not (*m*).

[This estate is said, in the *Mirroure*, to have been introduced by King Henry the first (*n*); and, notwithstanding its appellation, it is not peculiar to this realm: for it appears to have obtained also in Normandy; and to have been likewise used among the antient Germans (*o*); and some of the doctrines concerning it are of a feudal character (*p*). For if a woman seised of lands hath issue by her husband, and dies, the husband is the natural guardian of the child, and as such is in reason entitled to the profits of the lands, in order to maintain the child; for which reason the heir apparent of a tenant by the curtesy could not be in ward to the lord of the fee during the life of such tenant (*q*). As soon therefore as any child was born, and the father began to have a permanent interest in the lands, he became one of the *pares curiæ*, did homage to the lord, and was called tenant by the

(*l*) Co. Litt. 29 a—30 b; *Menville's estate*, 13 Rep. 23; 2 Saund. by Williams, 45, n. (5), 46, n. (q), 382, a, b; *Buckworth v. Thirkell*, 3 Bos. & Pul. 652, n.

(*m*) Robins. Gavelk. bk. ii. c. 1.

(*n*) Cap. 1, s. 3.

(*o*) It is said by Blackstone (citing Craig, l. 2, t. 19, s. 4), that the estate by the curtesy obtained also in Scotland, where it was called *Curialitas*; and hence he infers that probably our word *curtesy* signified an attendance by the husband on the lord's court (or *curia*), in the capacity of vassal or tenant in respect of the wife's land. Tenant

by curtesy is said, however, by Littleton, to be so called, "because "this is used in no other realm "but in England only." (Litt. s. 35.) And the manner in which the tenant is described in the old pleadings, "*Tenaunt per lei d'Engleterre*" (*Year-Book*, Trin. 1 Edw. 2) seems to confirm that etymology. See also Co. Litt. by Harg. 33 a, n. (5), and the Patent Roll of Hen. 3, there cited, which speaks of this estate as the *consuetudo et lex Angliæ*.

(*p*) Wright's Ten. 194.

(*q*) F. N. B. 143.

[curtesy *initiate*; and this estate being once vested in him by the birth of the child, was not suffered to determine by the subsequent death of the infant; and as tenant by the curtesy, he was considered to hold of the next lord of the fee (*r*).]

There are four requisites necessary to make a tenancy by the curtesy: marriage, seisin of the wife, issue, and death of the wife (*s*):—1. The marriage must be a legal one, and subsisting at the death; so that if void *ipso facto*, or avoided by a divorce, no estate by the curtesy can in either case be claimed (*t*). 2. The seisin of the wife must be an actual seisin, that is, possession of the lands: not a bare right to possess, which is a seisin *in law*, but an actual possession, which is a seisin *in deed* (*u*); nor may it be an estate in reversion on a freehold (*x*). On the other hand, her estate may be either legal or equitable (*y*). 3. The issue must be born alive. [Some have had a notion that it must be heard to cry, but that is a mistake. Crying, indeed, is the strongest evidence of its being born alive: but it is not the only evidence (*z*). The issue also must be born during the life of the mother; for if the mother dies in labour, and the Cæsarean operation is performed, the husband in this case shall not be tenant by the curtesy; because, at the instant of the mother's death, he was clearly not entitled, as having had no issue born, but the land descended to the child while yet in the mother's womb; and the estate being once so vested, shall not afterwards be divested (*a*). The issue must also be such as is capable of inheriting the mother's estate (*b*). Therefore, if a woman be tenant in tail male, and hath only a daughter born, the

(*r*) 2 Inst. 301; Paine's case, 8 Rep. 36 (*a*).

(*s*) Co. Litt. 30 a.

(*t*) Rennington v. Cole, Noy, 29.

(*u*) Co. Litt. 31 a, 29 a.

(*x*) 2 Bl. Com. 127.

(*y*) Casborne v. Scarfe, 1 Atk.

603; Moore v. Webster, Law Rep., 3 Eq. Ca. 267; Appleton v. Rowley, ib., 8 Eq. Ca. 139.

(*z*) Dyer, 25; Paine's case, 8 Rep. 34.

(*a*) Co. Litt. 29 b.

(*b*) Litt. s. 52.

[husband is not thereby entitled to be tenant by the curtesy ; because such issue female can never inherit the estate in tail male (*c*). The time when the issue was born is immaterial, provided it were during the coverture ; for whether it were born before or after the wife's seisin of the lands, and whether it be living or dead at the time of the seisin, or at the time of the wife's decease, the husband shall be tenant by the curtesy (*c*). The husband by the birth of the child becomes, as was before observed, tenant by the curtesy *initiate*, and may do many acts to charge the lands (*d*) ; but his estate is not *consummate* till, 4. The death of the wife, which is the last requisite to make a complete tenant by the curtesy (*e*).]

To complete our view of this species of interest, it must be added that by the 40 & 41 Vict. c. 18 (an Act passed chiefly in reference to estates held under a *settlement*), a power, though subjected to certain restrictions, is conferred upon tenants by the curtesy to demise for twenty-one years the lands which they hold under that title ; and such leases will consequently be good as against those in remainder (*f*) ; and this power of tenants by the curtesy has been confirmed and enlarged by the Settled Land Act, 1882, hereinafter more particularly discussed.

(3.) A third estate for life of the legal kind, as contradistinguished from the conventional, is the estate *in dower* ; that is to say, the estate which, by the common law, a woman, on the death of her husband, has, for the term of her natural life, in a portion of his lands and tenements (*g*). This portion amounts to the third part in value of such lands and tenements ; except the amount be otherwise by particular custom ; as in gavelkind, whereby she is entitled

(*c*) Co. Litt. 29 b.

(*d*) Co. Litt. 30 a.

(*e*) *Jones v. Davies*, *per Cur.*, 5 H. & N. p. 779.

(*f*) 40 & 41 Vict. c. 18, s. 46.

(*g*) Co. Litt. 30 b—41 a ; *Stoughton v. Leigh*, 1 Taunt. 402 ; *Moody v. King*, 2 Bing. 447 ; *Jones v. Jones*, 2 Tyrw. 531.

to a moiety ; but subject, in this instance, to the condition of remaining chaste and unmarried. And by the custom of some places, she is entitled to claim the whole ; and in others, again, only a quarter (*h*).

[Dower is called in Latin by the foreign jurists *doarium*, but by Bracton and our English writers *dos* : which among the Romans signified the marriage portion which the wife brought to her husband, but which with us is applied to signify the interest in his lands which the wife takes from her husband, and to which the civil law had nothing that bore any resemblance. Some have ascribed the introduction of dower to the Normans, as a branch of *their* local tenures (*i*) ; and it appears to have been first introduced into the system of feuds (wherein it was called *trien*s, *tertia*, and *dotalitium*) by the Emperor Frederick the second, who was contemporary with our King Henry the third (*k*). It may therefore be that dower is with us the relic of a Danish custom ; since, according to the historians of that country, dower was introduced into Denmark by Swein, the father of our Canute the Great, out of gratitude to the Danish ladies, who sold all their jewels to ransom him when taken prisoner by the Vandals (*l*). However this may be, the reason which our law gives for adopting it, is a very plain and sensible one : viz., for the sustenance of the wife, and the nurture and education of the younger children (*m*).

In treating of this estate, let us first consider *who* may be endowed ; secondly, of *what* she may be endowed ; thirdly, the manner *how* she shall be endowed ; and fourthly, how dower may be *barred*, or otherwise defeated.]

1. And, first, the dowager must be the actual wife of him under whom she claims at the time of his decease.

(*h*) 2 Bl. Com. 129 ; Robinson on Gavelkind, bk. ii. c. 2.

(*i*) Wright's Ten. 192.

(*k*) Craig, l. 2, t. 22, s. 9.

(*l*) Mod. Un. Hist. xxxii. 91.

(*m*) Bract. l. 2, c. 39, s. 1 ; Co. Litt. 30 b.

If there have been a dissolution of the marriage (or, as it was formerly called, a divorce *a vinculo matrimonii*), she shall not be endowed; for *ubi nullum matrimonium, ibi nulla dos* (*n*). But a divorce *a mensâ et thoro* (or, as we should now say, a judicial separation) did not, by our common law, destroy the dower, not even though decreed for adultery itself (*o*). [Yet by the statute of Westminster the second (13 Edw. I.) st. 1, c. 34, if a woman voluntarily left her husband, and lived with an adulterer, she lost her dower, unless her husband was voluntarily reconciled to her (*p*). By the antient law, the wife of a person attainted could not be endowed; to the intent, says Staunforde, that if the love of a man's own life cannot restrain him from such atrocious acts, the love of his wife and children may (*q*): though Britton gives it another turn, viz., that it is presumed the wife was privy to her husband's crime (*r*). However, the statute 1 Edw. VI. c. 12, abated the rigour of the common law in this particular, and allowed the wife her dower. But a subsequent statute (5 & 6 Edw. VI. c. 11, s. 13) revived this severity against the widows of attainted *traitors*, and barred them of their dower, but not the widows of attainted *felons* (*s*).

2. We are next to inquire of *what* a widow may be endowed. And supposing no act to have been done to defeat or abridge her rights, she is by law entitled to be

(*n*) Bract. l. 2, c. 39, s. 4. But she did not lose her dower merely because the marriage was *voidable*, if there was no actual divorce. (Co. Litt. 33 a.) Nor by reason of her having been married under the age of twelve, or to a husband under the age of fourteen; provided (says Blackstone, vol. ii. p. 131) she was above nine years old at her husband's death. In Bracton's time, the age was indefinite, and dower arose *si uxor possit dotem promereri*,

et virum sustinere. (Ib. s. 3.)

(*o*) Co. Litt. 33 a, 33 b; Sidney v. Sidney, 3 P. Wms. 276.

(*p*) 2 Inst. 435; Woodward v. Dowse, 10 C. B. N. S. 722.

(*q*) P. C. b. 3, c. 33.

(*r*) C. 110.

(*s*) An alien woman, married without the royal licence, might not have claimed dower (Co. Litt. by Harg. 31 b); but by 33 & 34 Vict. c. 14, s. 10 (1), this would now seem to be altered.

[endowed of all lands and tenements of which her husband was seised in fee simple or in fee tail at any time during the coverture, and of which any issue, which she might have had, might by possibility have been heir (*t*). Therefore, if a man seised in fee simple hath a son by his first wife, and after marries a second wife, she shall be endowed of his lands; for her issue might by possibility have been heir on the death of the son by the former wife. But, if there be a donee in special tail, who holds lands to him and the heirs of his body, begotten on Jane his wife; though Jane may be endowed of these lands, yet if Jane dies, and the donee marries a second wife, that second wife shall never be endowed of the lands entailed; for no issue that *she* could have could by any possibility inherit them (*u*). A seisin in law of the husband will be as effectual as a seisin in deed, in order to render the wife dowable (*x*); for it is not in the wife's power to bring the husband's title to an actual seisin, as it is in the husband's power to do with the wife's title: which is one reason why he shall not be tenant by the curtesy but of such lands whereof the wife, or he himself in her right, was actually seised in deed (*y*). She may also now claim dower in an estate of inheritance in possession, of which her husband was merely the *equitable* owner (*z*).

3. Next, as to the *manner* in which a woman is to be endowed. Formerly, a woman was sometimes endowed by act of the party. Thus, there was: 1. Dower *ad ostium ecclesiæ* (*a*); which was where tenant in fee simple of full age, openly at the church door, after affiance made, and (Sir Edward Coke in his translation of Littleton adds) troth plighted between them, endowed his wife with the

(*t*) Litt. ss. 36, 53. However, the right to dower did not attach to a castle built for the defence of the realm, or to a common without stint. (See Co. Litt. 316; Gerard v. Gerard, 3 Lev. 401.)

(*u*) Litt. s. 53.

(*x*) 3 & 4 Will. 4, c. 105, s. 3.

(*y*) Co. Litt. 31 a.

(*z*) 3 & 4 Will. 4, c. 105, s. 2.

(*a*) Litt. s. 39.

[whole, or such quantity as he pleased, of his lands, at the same time specifying and ascertaining the same; on which the wife, after her husband's death, might enter without further ceremony. And 2. Dower *ex assensu patris*, which was only a species of dower *ad ostium ecclesie*, made when the husband's father was alive, and the son, by his consent expressly given, endowed his wife with parcel of his father's lands (*b*).] But both these descriptions of dower, having been abolished by a modern Act of Parliament, have now disappeared from our system (*c*); and we need only therefore concern ourselves with dower *by the common law* or *by particular custom* (*d*).

[By the old law, a woman could not be endowed without a fine paid to the lord; neither could she marry again without his licence, lest she should contract herself to the lord's enemy (*e*). This licence the lords took care to be well paid for, and would sometimes force the dowager to a second marriage, in order to gain the fine; until it was provided by *Magna Charta*, that the widow should not be distrained to marry afresh, if she chose to live without a husband (*f*); and further, that nothing should be taken for assignment of the widow's dower; and that she should remain in her husband's capital mansion-house for forty days after his death, during which time, called her *quarantine*, her dower was to be assigned to her. The particular lands to be held in dower must have been assigned by the heir of the husband, or his guardian (*g*); not only for the sake of notoriety, but also to entitle the lord of the fee to demand his services of the heir, in respect of the lands so holden. For the heir by his entry became tenant to the lord, and the widow became immediate tenant to the heir by a kind of subinfeudation or under-tenancy,

(*b*) Litt. s. 40.

(*c*) 3 & 4 Will. 4, c. 105, s. 13.

(*d*) Dower *de la plus belle*, was a consequence of the military tenures, and was abolished with them. (2 Bl.

Com. p. 132; Co. Litt. 38 a.)

(*e*) Mir. c. 1, s. 3.

(*f*) Cap. 7.

(*g*) Co. Litt. 34 b, 35 a.

[completed by this investiture or assignment (*h*): and such tenure might still be created notwithstanding the statute of *Quia emptores*, because the heir parted not with the fee simple, but only with an estate for life. If the heir or his guardian did not assign the widow her dower within the term of quarantine, or assigned it unfairly, she had her remedy by action of dower, and the sheriff was directed to assign it (*i*); and if the guardian assigned too much, the heir had his remedy, by *writ of admeasurement*, to recover the excess (*k*). If the thing of which she was endowed was divisible, her dower must have been set out by metes and bounds: but if it was indivisible, she must have been endowed specially; as of the third presentation to a church, the third toll-dish of a mill, the third part of the profits of an office, the third sheaf of tithe, and the like (*l*).

4. Lastly, we are to inquire how dower may be *barred*, or otherwise defeated. A widow may be barred of her dower not only by elopement and adultery, by divorce, the treason of her husband, and other disabilities before mentioned,—but also by detaining the title-deeds or evidences of the estate from the heir; that is, she will be barred until she restores them (*m*).] She may also lose her right to dower by a jointure settled on her at the time of marriage. A jointure signified a joint estate limited to both husband and wife (*n*), and was defined by Sir Edward Coke (*o*) as being “a competent livelihood of freehold for “the wife, of lands and tenements; to take effect presently, “in possession or profit, after the decease of the husband; “for the life of the wife at least;” which description appears to have been framed from the purview of the stat.

(*h*) Gilb. Ten. 173.

(*i*) Co. Litt. 34 b, 35 a.

(*k*) F. N. B. 148; Finch, L. 314; stat. Westm. 2, 13 Edw. 1, c. 7.

(*l*) Co. Litt. 32 a.

(*m*) Anne Bedingfield's case, 9 Rep. 15 b.

(*n*) Vernon's case, 4 Rep. 3 b; Earl of Buckinghamshire v. Drury, 3 Bro. P. C. 492; Duchess of Somerset's case, Dy. 97 b.

(*o*) Co. Litt. 36 b; Cresswell v. Byron, 3 Bro. C. C. 362.

27 Hen. VIII. c. 10, commonly called the Statute of Uses, of which we shall speak more fully hereafter, and regarding which it is sufficient for the present to observe, that [before the making of that statute the greatest part of the land of England was conveyed “to uses,” the property or possession of the soil being vested in one man, and the *use* or profits thereof in another; and in such a case, though a husband had the profits conveyed to his *use* in absolute fee simple, yet the wife was not entitled to any dower in the lands, her husband not being *seised* thereof; wherefore it became usual, on marriage, to settle by express deed some special estate *to the use of the husband and his wife, for their lives, in joint-tenancy or jointure*; which settlement would be a provision for the wife in case she survived her husband. But at length the Statute of Uses ordained that such as had the *use* of lands should, to all intents and purposes, be reputed and taken to be absolutely *seised* thereof; and in consequence of such legal seisin, all wives would have become dowable of such lands as were held to the use of their husbands, and entitled at the same time to any special lands that might be settled in jointure; wherefore the same statute provided that, upon the husband’s making or procuring to be made such an estate in jointure to the wife before marriage, she should be for ever precluded from her dower (*p*). But then these four requisites must have been observed.—1. The jointure must have been limited to take effect immediately on the death of the husband. 2. It must have been for the wife’s own life at least, and not *pur autre vie*, or for any term of years, or other smaller estate. 3. It must have been made to herself, and to no other in trust for her. 4. It must have been made, and must have appeared by the deed to be made, in satisfaction of her whole dower, and not of any particular part of it (*q*). On the other hand, if the jointure was made to her *after* marriage, she had her election after her husband’s death,

(*p*) Vernon’s case, 4 Rep. l. 2.

(*q*) Tinney v. Tinney, 3 Atk. 3.

[to either accept it, or to refuse it and betake herself to her dower at common law; for she was not capable of consenting to it during the coverture. And if, by any fraud or accident, a jointure made before marriage, proved to be on a bad title, and the jointress was evicted, or turned out of possession, then, by the provisions of the same statute, she was to have her dower *pro tanto* at the common law (*r*).

There were some advantages attending tenants in dower that did not extend to jointresses; and so *vice versâ*, jointresses were in some respects more privileged than tenants in dower. Tenant in dower, by the old common law, was subject to no tolls or taxes; and hers was almost the only estate on which, when derived from the king's debtor, the king could not distrain for his debt, if contracted during the coverture (*s*). But, on the other hand, a widow might enter at once, without any formal process, on her jointure land; whereas no small trouble, and a tedious method of proceeding by way of process in the courts, was necessary to compel an assignment of dower (*t*). So, though dower was forfeited by the treason of the husband, or by the wife's elopement and adultery, yet the title to lands settled in jointure remained unimpeached (*u*).]

Independently of the bar of dower by way of jointure, if the husband makes any provision for his wife by will or otherwise, in such a manner as clearly to indicate an intention that it shall be taken in lieu of dower, she will be barred by her acceptance, after his death, of the provision so made; but she is allowed her option or election whether she will accept it or not (*x*).

Dower would also be barred if the husband, on acquiring his estate, took the conveyance of the land in a form of

(*r*) *Beard v. Nuthall*, 1 Vern. 428. 277.

(*s*) Co. Litt. 31 a; F. N. B. 150.

(*t*) Co. Litt. 36 b.

(*u*) *Sidney v. Sidney*, 2 P. Wms.

(*x*) Co. Litt. by Harg. 36 b, n. 1;

Thompson v. Nelson, 1 Cox, 447;

3 & 4 Will. 4, c. 105, ss. 9, 10.

what was called a *conveyance to uses to bar dower* (*y*), which conveyance (the exact nature of which will be hereafter expounded) was a contrivance founded on the Statute of Uses, and which, while it gave the husband a clear dominion over the property, yet did not give him precisely such an estate as by the rules of law entitled his widow to her dower.

On the other hand, if the husband neglected, on acquiring an estate subject to dower, to bar his widow's claim by taking a conveyance in the proper form, the wife's right (up to a late period) could not have been defeated by any alienation or device which her husband might afterwards think fit to make of his estate—her title to dower remaining paramount; and her release of dower by means of a *fine* was therefore necessary to a valid conveyance of such lands by the husband (*z*); which necessity operated as a clog on the transfer of property; and eventually, when by the great increase in modern times of personal property, the husband could make ample provision otherwise for his wife, and could also provide for her by will out of his real estate, no sufficient reason for continuing this inconvenient restraint on the husband's alienation remained; and by the Dower Act (3 & 4 Will. IV. c. 105), it was accordingly provided, that all dispositions of his land (whether absolute or partial, and whether by conveyance in his lifetime, or by will), and all debts and incumbrances to which his land might be subject, should be valid and effectual, as against the widow's right to dower (*a*). The same Act also increased the facilities for barring dower, a simple declaration for that purpose, introduced into the deed by which the land was conveyed to the husband, or into any deed executed by him, or into his last will and testament, being made sufficient to defeat the dower. The same Act

(*y*) Butler's *Fearne*, 346—349,
9th ed.

(*a*) *Lacey v. Hill*, Law Rep., 19
Eq. Ca. 346.

(*z*) Vide *infra*, c. XIX.

further enacted, that where the husband devised for his wife's benefit any part of his land that was subject to her dower, she should be thereby barred of her dower unless a contrary intention was declared by the will (*b*); but a bequest of personalty, or a devise of land on which her claim would not attach, would not have operated as a bar of dower (*c*). But it is to be borne in mind that none of the provisions of this Act apply to the case of women married on or before 1st January, 1834; so that as to all such the former law of dower remains in force.

[The wife's dower seems at first to have extended to a *moiety* of the husband's lands, but to have been forfeitable by incontinency or a second marriage; then by the charter of Henry the first, the condition of widowhood and chastity was only required in case the husband left any issue (*d*); and afterwards the condition appears to have been lost sight of altogether. Under Henry the second, according to Glanvil, the dower *ad ostium ecclesie* was the most usual species of dower (*e*); and was binding upon the wife, if by her consented to at the time of marriage (*f*); but in those days of feudal rigour, the husband was not allowed to endow his widow *ad ostium ecclesie* with more than the third part of the lands whereof he then was seised (though he might endow her with less), for by a too liberal endowment the lord might have been defrauded of his wardships and other feudal profits (*g*). But if no dower *ad ostium ecclesie* was made to her, then she was endowed by the common law of the third part (which was called her *dos rationabilis*) of such lands and tenements as the husband was seised of at the time of the espousals,

(*b*) In re Thomas, Thomas v. Howell, 34 Ch. Div. 166.

(*c*) Chalmers v. Storil, 2 Ves. & Bea. 244; Dickson v. Robinson, Jacob, 503.

(*d*) "*Si mortuo viro uxor ejus remanserit, et sine liberis fuerit, dotem suam habebit; si vero uxor cum liberis*

remanserit, dotem quidem habebit, dum corpus suum legitime servaverit."—Cart. Hen. 1, A.D. 1101. Introd. to Great Charter, edit. Oxon. p. iv.

(*e*) Glanv. l. 6, cc. 1 and 2.

(*f*) Gr. Coustum. c. 101.

(*g*) Braet. l. 2, c. 39, s. 6.

[and no other; unless he especially engaged before the priest to endow her of his future acquisitions (*h*); and, if the husband had no lands, an endowment in goods, chattels, or money, at the time of espousals, was a bar of any dower in land which he afterwards acquired (*i*). In King John's Magna Charta, and the first charter of Henry the third (in the year 1216), no mention is made of any alteration of the common law, in respect of the lands subject to dower; but in the charters of 1217 and 1224, it is particularly provided, that a widow shall be entitled for her dower to the third part of *all* such lands as the husband had held in his lifetime; though in case of a specific endowment of less, *ad ostium ecclesiæ*, the widow had still no power to waive it after her husband's death. And this continued to be the law during the reigns of Henry the third and Edward the first (*k*). In Henry the fourth's time it was denied to be law, that a woman should be endowed of her husband's goods and chattels (*l*): and, under Edward the fourth, Littleton lays it down expressly, that a woman might be endowed *ad ostium ecclesiæ* with

(*h*) *De questo suo* (Glanv. ubi sup.); *de terris acquisitis et acquirendis*. (Bract. ubi sup.)

(*i*) Glanv. ubi sup. When special endowments were made *ad ostium ecclesiæ*, the husband, after affiance made, and troth plighted, used to declare with what specific lands he meant to endow his wife, "*quod dotat eam de tali manerio cum pertinentiis, &c.*" (Bract. ubi sup.); and therefore in the old York ritual, (Seld. Ux. Hebr. l. 2, c. 27,) there is at this part of the matrimonial service, the following rubric: "*sacerdos interroget dotem mulieris; et si terra ei in dotem detur, tunc dicatur psalmus iste, &c.*" When the wife was endowed generally ("*ubi quis uxorem suam dotaverit in generali,*

de omnibus terris et tenementis"—Bract. l. 2, c. 39, s. 6), the husband seems to have said, "with all my lands and tenements I thee endow;" and then they all became liable to her dower. When he endowed her with personalty only, he used to say, "with all my wordly goods, (or, as the Salisbury ritual has it, *with all my worldly chattel*,) I thee endow;" which entitled the wife to her thirds, or *pars rationabilis* of his personal estate; which is provided for by Magna Charta, c. 26.

(*k*) Bract. ubi sup.; Britton, cc. 101, 102; Flet. l. 5, c. 23, ss. 11 12.

(*l*) P. 7 Hen. 4, 13, 14.

[*more* than a third part (*m*) ; and should have her election, after her husband's death, to accept such dower, or to refuse it and betake herself to her dower at the common law (*n*).]

As to the existing law, the reader will have observed, that the right to dower is now, in regard to women married after 1st January, 1834, reduced to one of the most precarious description which the husband may bar or defeat at his pleasure ; though if he fails to do so, the widow is still in a condition to assert her title against the heir. And to this it may be added that, by 40 & 41 Vict. c. 18, s. 46, a dowress has a right to demise any unsettled estate (under certain restrictions specified in the Act, and with the exception of the principal mansion house and demesne lands) for a term not exceeding twenty-one years, and that a lease so granted will consequently be good against those in remainder, notwithstanding her death ; but a dowress is not a tenant for life within the meaning of the Settled Land Act, 1882, and therefore may not as such exercise the powers of a tenant for life under that Act.

(*m*) Litt. s. 39 ; F. N. B. 150.

(*n*) Litt. s. 41.

CHAPTER V.

OF ESTATES LESS THAN FREEHOLD.



HAVING now investigated the nature of freehold estates, we arrive at the consideration of those which are less than freehold, otherwise *chattels real*, *chattels* (or *goods and chattels*) expressing any kind of property which, having regard either to the subject-matter, or to the quantity of interest therein, is not *freehold* (a). The appellation "*chattels*" was originally derived from the technical Latin word "*catalla*," which, among the Normans, primarily signified only beasts of husbandry, but, in a secondary sense, was applicable to all moveables in general, and indeed to whatever was not a *fief* or *feud* (b). And the English law adopts the term, considering as a chattel whatever amounts not to a freehold, which is like the Norman fief, requiring immobility in respect of the subject-matter, and duration for a life at least, as regards the quantity of interest or estate. Any estate in lands and tenements, which amounts not to freehold, is consequently a chattel; but inasmuch as it concerns, or *savours* of, the realty (c), it is denominated a chattel *real*, to distinguish it from things which do not concern, or savour of, the realty, and which are described as chattels *personal* (d).

Chattels, whether real or personal, form a subordinate class of property, and receive the common denomination of *personal* estate, to distinguish them from estates of freehold,

(a) Co. Litt. 118 b.

(b) 2 Bl. Com. 386.

(c) Co. Litt. 118 b.

(d) 2 Bl. Com. p. 387.

which are denominated *real* estate (*e*). And as regards the incidents distinguishing the two denominations, though “livery of seisin” was a ceremony without which no estate of freehold could pass at the common law, it was no more requisite to the transfer of a chattel real, than to the transfer of a chattel personal; also, a chattel real belongs, on the death of the owner, to his executor or administrator, like a chattel personal, and does not descend, like a freehold of inheritance, to his heir; again, the interest in a chattel real, as in a chattel personal, may be made to commence *in futuro*, which was not allowed, at common law, as to the freehold in a corporeal hereditament; also, the tenant of a chattel real is not said to be *seised*, like the tenant of a freehold, but to be *possessed* only, as if it were a chattel personal; moreover, there can be no estate tail in a chattel real, any more than in a chattel personal, but only in a freehold (*f*).

Of estates that are less than freehold, there are three sorts: I. Estates for years; II. Estates at will; III. Estates by sufferance.

I. An estate for *years* is where a man has an interest in lands and tenements, and a possession thereof by virtue of such interest, for some fixed and determinate period of time (*g*); as in the case where lands are let for the term of a certain number of years, agreed upon between the lessor and the lessee (*h*), and the lessee enters thereon (*i*); and this amounts but to a chattel real, however long the period of time for which the lands are demised; for, in contemplation of law, no interest for a certain and determinate

(*e*) 2 Bl. Com. 386.

(*f*) Ib. 398.

(*g*) Co. Litt. 43 b.—54 b.

(*h*) We may here remark that the terminations “—or” and “—ee” obtain, in law, the one an active, the other a passive signification. The feoffor is he that

maketh a feoffment, and the feoffee is he to whom it is made; the donor is he that giveth land in tail, and the donee is he who receiveth it; and the lessor is he that granteth a lease, and the lessee is he to whom it is granted.

(*i*) Litt. s. 58.

period of time,—even for 1,000 years,—is as large as an estate for life, which, as we have seen, is the lowest description of freehold (*k*).

[Though the lease be but for half a year, or a quarter, or any less time, the lessee is for some purposes reputed a tenant for years, a year being the shortest term of which the law for these purposes takes notice (*l*). And concerning the division and calculation of time by the English law, it is proper here to observe: That a year is a determinate and well-known period, consisting commonly of 365 days; for, though in bissextile or leap-years it consists properly of 366, yet by the stat. 40 Hen. III. the increasing day in the leap-year, together with the preceding day, shall be accounted for one day only. That a month is a more ambiguous term, being either a *lunar* month which consists of twenty-eight days; or a *calendar* month of unequal lengths, according to the Julian division in our common almanacks, and whereof in a year there are twelve.] By the old common law, a “month” used to be, in matters temporal, a lunar month, or twenty-eight days; in matters ecclesiastical, a calendar month (*m*): though this was a rule of the most general description, and yielded easily to exception where custom or the obvious meaning of the parties, or any other special consideration, made it reasonable to depart from the usual construction of the term month (*n*); *e.g.*, if money were lent for three months, these should be intended calendar months, whether a bill of exchange or a promissory note timed to mature with the three months was given or not (*o*); also, in all statutes, a month has long meant a calendar month (*p*); also, in the Orders and Rules of 1883

(*k*) Co. Litt. 46 a.

(*l*) Litt. s. 67.

(*m*) Lacon v. Hooper, 6 T. R. 226; Simpson v. Margitson, 11 Q. B. 23.

(*n*) Davy v. Salter, 3 Salk. 346;

Rex v. Cussons, 1 Sid. 186; Hipwell v. Knight, 1 Y. & Col. 401.

(*o*) Str. 446.

(*p*) 52 & 53 Vict. c. 63, s. 3, repealing but re-enacting 13 & 14 Vict. c. 21.

of the Supreme Court of Judicature, and generally in all judgments and orders made by the Court, the word month denotes a calendar month (*q*). [The old rule, however, continues to apply to a lease; and consequently, a lease for “twelve months” is only for forty-eight weeks; and a lease for six months is not a lease for half a year (*r*). But where the lease was for “*a* twelvemonth,” in the singular number, it was held to be good for the whole year; for herein the law receded from its usual calculation, because the ambiguity between the two methods of computation ceased,—it being generally understood, that by the space of time called thus, in the singular number, a twelvemonth, is meant the whole year, consisting of one solar revolution (*s*).] As regards the legal significance of a day, all the twenty-four hours are usually reckoned therein (*t*); therefore, if I am bound to pay money on any certain day, I discharge the obligation (as a general rule) if I pay the money any time before twelve o’clock at night, after which the following day commences (*u*); and with a view to convenience, the law considers the ordinary periods of time without regard to their fractional parts (*x*). Thus, half a year consists of 182 days, and a quarter of a year of 91; the remaining hours being in either case rejected (*y*); also, the fractions of a day will not usually be regarded; nevertheless, when justice requires it, this rule of convenience will be put aside, and a more accurate discrimination of time will be observed; *e.g.*, for the purpose of determining priorities in the case of successive mortgagees, and especially of deeds registered in the Middlesex and Yorkshire Registries, the

(*q*) Order LXIV. r. 1.

(*r*) *Wilkinson v. Calvert*, 3 C. P. D. 360; *Barlow v. Teal*, 15 Q. B. D. 403.

(*s*) *Catesby’s case*, 6 Rep. 62 a.

(*t*) 2 Bl. Com. p. 141; Co. Litt. 135 a; *Maund’s case*, 7 Rep. 28 b; *Duppa v. Mayo*, 1 Saund. 287.

(*u*) Bl. Com. ubi sup; 43 & 44 Vict. c. 9 (Greenwich time).

(*x*) *Wright v. Mills*, 4 H. & N. 488.

(*y*) Co. Litt. 135 b; *Bishop of Peterborough v. Catesby*, Cro. Jac. 167; Yelv. 100; Dy. 345 a.

difference of an hour or of a minute may have to be and will be regarded (z). But to return to estates for years.

[These estates were originally granted to mere farmers or husbandmen, who every year rendered some equivalent in money, provisions, or other rent, to the lessors or landlords; and in order to encourage them to manure and cultivate the ground, they had a permanent interest granted them, not determinable at the will of the lord. And yet their possession was esteemed of so little consequence, that they were rather considered as the bailiffs or servants of the lord, who were to receive and account for the profits at a settled price, than as having any property of their own in their lands (a). And therefore they were not allowed to have a freehold estate; but their interest, such as it was, vested after their deaths in their representatives, who were to make up the accounts of the deceased with the lord and the other creditors, and were entitled to the stock upon the farm. The lessee's estate might also, at one period of the antient law, be at any time defeated by a collusive recovery suffered by the tenant of the freehold, in an action brought against him for the purpose (b).

So long as estates for years were thus precarious, it is no wonder that they were usually short, and indeed by the antient law, no leases for more than forty years were allowable: because any longer possession, especially when given without any livery declaring the nature and duration of the estate, tended to defeat the inheritance (c). Yet this law was soon antiquated; for in Madox's collection of antient instruments, some leases for years of a pretty early date are found which considerably exceed

(z) Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), s. 5, (2), E.; and see *Tomlinson v. Bullock*, 4 Q. B. D. 230; and *Clarke v. Bradlaugh*, 7 Q. B. D. 151; 8 Q. B. D. 63.

(a) Bac. Ab. Leases.

(b) Co. Litt. 46 a; 2 Inst. 321; *Flower v. Rigden*, Cro. Eliz. 284; *Pledgard v. Lake*, ib. 718.

(c) *Mirroure*, c. 2, s. 27; Co. Litt. 46 b, 45 a.

[that period (*d*) ; and long terms—for three hundred years or a thousand—were certainly in use in the time of Edward the third (*e*), and probably of Edward the first (*f*). At all events, when by the stat. 21 Hen. VIII. c. 15, the lessee, otherwise called the termor, was protected against fictitious recoveries, and his interest rendered more secure and permanent, long terms began to be more frequent than before, and were afterwards extensively introduced, being found extremely convenient for family settlements and mortgages (*g*).

Every estate which expires at a period certain and prefixed, by whatever words created, is an estate for years ; whence this estate is frequently called a term, *terminus*, because its duration or continuance is limited and determined ; for every such estate must have a certain beginning and certain end (*h*). But *id certum est, quod certum reddi potest* : therefore, if a man make a lease to another, for so many years as J. S. shall name, it is a good lease for years (*i*) ; for though it is at present uncertain, yet, when J. S. hath named the years, it is then reduced to a certainty. If no day of commencement is named in the creation of this estate, it begins (provided the lease be by deed) from the making or delivery of the lease (*k*). A lease for so many years as J. S. shall live, is (regarded as a mere term) void from the beginning ; for it is neither certain, nor can ever be reduced to a certainty, during the continuance of the lease (*l*). And the same doctrine holds, if a parson make a lease of his glebe for so many years as he shall continue parson of Dale ; for this is still more uncertain. But a lease for twenty or more years, if

(*d*) Madox, *Formulare Anglican.*
No. 239, fol. 140 ; ib. No. 245, fol.
146 ; ib. No. 248, fol. 148, &c.

(*e*) 32 Ass. pl. 6 ; Bro. Abr. t.
Mordauncestor, 42 ; Spoliation, 6.

(*f*) Stat. of Mortmain, 7 Edw. 1.

(*g*) Ascoug's case, 9 Rep. 135 ;

Brediman's case, 6 Rep. 57.

(*h*) Co. Litt. 45 b.

(*i*) Bishop of Bath's case, 6 Rep.
35 b.

(*k*) Co. Litt. 46 b ; Doe v. Ben-
jamin, 9 Ad. & El. 644.

(*l*) Co. Litt. 45 b.

[J. S. shall so long live, or if he shall so long continue parson of Dale, is good; for there is a certain period fixed, beyond which it cannot last; though it may determine sooner, on the death of J. S. or his ceasing to be parson there (*m*).]

As already observed, the word *term*, when applied to this description of estate, signifies the estate itself which the grant confers, and not merely the period of time specified in the grant; and therefore the term may expire during the continuance of the time, as by surrender, forfeiture and the like. For which reason, if I grant a lease to A. for the term of three years, and after the expiration of the said term to B. for six years, and A. surrenders or forfeits his lease at the end of one year, B.'s interest shall immediately take effect; but if the remainder be to B. from and after the expiration of the said "three years," or from and after the expiration of the said "time," in this case B.'s interest will not commence till the time is fully elapsed, whatever may become of A.'s term (*n*).]

An estate for years not being created by livery of seisin, the tenant, in proper technical language, is not said to be *seised*, but to be *possessed* thereof; also, for the creation of this estate, it is not proper to limit it to a man and his "heirs," but to a man and his "executors and administrators;" and indeed it is sufficient if it be granted to himself only, without mention of his personal representatives; for in these, on his death, the law will vest it without any special words of limitation.

Again, as it required no livery of seisin, so at common law this estate, for whatever length of duration, might be constituted by mere agreement, verbal or written, if followed up by the entry of the lessee. But by the statute of Frauds (29 Car. II. c. 3), it was enacted that no lease for more than three years, or at a lower rent than two-

(*m*) Co. Litt. 45 b.

(*n*) Ibid.

thirds of the improved value of the thing demised, should be effectual, unless put into writing and signed by the party demising or his agent thereunto lawfully authorized by writing (*o*); and by 8 & 9 Vict. c. 106, s. 3, a lease theretofore required to be in writing (if made after the 1st of October, 1845) was rendered void at law unless made *by deed*; but a tenant for life may lease for a term not exceeding three years by writing under hand only (*p*).

A bare demise by the common law, as contradistinguished from a bargain and sale under the Statute of Uses, does not in itself vest a complete estate for term of years, in the lessee: it only gives him a right of entry on the tenement; which right is called his “interest in the term,” or *interesse termini*; and when he has actually so entered, the estate is then, and not before, completely vested in him. However, the *interesse termini* is so far in the nature of an estate, that, even before entry, the lessee may grant his interest over to another; though, on the other hand, a lessee is not, before entry, in a condition to maintain an action of trespass for an injury to the land (*q*).

[Tenant for term of years hath incident to and inseparable from his estate, unless by special agreement, the same estovers as a tenant for life; that is to say, house-bote, fire-bote, plough-bote, hay-bote (*r*), and the like; and the doctrine of *waste*, also, applies generally to tenants for years.]

With regard to emblements, where his term depends upon a certainty, as if the tenant holds from Midsummer for ten years, and in the last year he sows a crop of corn, and it is not ripe and cut before Midsummer, by the common law, the landlord shall have it, in the absence of any

(*o*) 29 Car. 2, c. 3, ss. 1, 2; Lord Bolton v. Tomlin, 5 Ad. & El. 856.

(*p*) Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 7 (iii.).

(*q*) 2 Bl. Com. 144; Plowd. 198.

See Doe v. Walker, 5 Barn. & Cress. 111; Co. Litt. 338 a, 270 a; Neal v. Mackenzie, 1 Mee. & Wels. 747.

(*r*) Co. Litt. 41 b,

special contract or custom to the contrary; for the tenant knew the expiration of his term, and therefore it was his own folly to sow that of which he never could reap the profits (*s*). But where the lease for years depends upon an uncertainty, as upon the death of the lessor, being himself only tenant for life, or being a husband seised in right of his wife, or if the term of years be determinable upon a life or lives (*t*): in these and similar cases, the estate for years not being certainly to expire at a time foreknown, but by the act of God,—the tenant for years, or his representatives, shall have the emblements in the same manner that a tenant for life, or his representatives, are entitled thereto (*u*). But it is otherwise if the term determine by the act of the party himself; as if he does anything that amounts to a forfeiture: in which case the emblements shall go to the lessor, and not to the lessee, who hath determined his estate by his own default (*x*). The operation of the common law right to emblements, however, is now much more limited than it once was, having ceased (as we have seen), by the effect of 14 & 15 Vict. c. 25, to apply to such tenants as hold at a rack rent under a landlord entitled for life or any other uncertain interest, and whose lease or tenancy determines by the death of their landlord, or by the cesser of his estate; and a protection of a different kind—that is to say, a continuing of their holding till the end of the current year—being now provided for tenants so circumstanced.

The tenancy “from year to year,” or “by the year,” may be created, in the first place, by the express agreement of the parties (*y*); and this (provided the rent

(*s*) 2 Bl. Com. p. 145; Litt. s. 68.

(*t*) But a lease for years by a tenant for life, or by a husband seised in right of his wife, or entitled as tenant by the curtesy, is now in general, by the Settled

Estates Act, 1877, and the Settled Land Act, 1882, of a certain and determinate duration.

(*u*) 2 Bl. Com. p. 145.

(*x*) Co. Litt. 55 b.

(*y*) A tenancy may be for a *less* period than a year, as, *e.g.*, from

reserved be two-thirds at the least of the annual value of that which is demised) may be either verbal or in writing; but if the rent be under that amount, then it must be *by deed*. Secondly, such a tenancy may arise by construction of law; *e. g.*, if a man demises premises to another at a yearly rent, no length of time being expressed, the law will construe this as a demise from year to year (*z*); and the law will always imply a tenancy from year to year where there is an occupation at an annual rent, and there is no evidence that the occupier's estate is of a different description (*a*). And if a man was let into possession under a demise not under seal, for a term of more than three years, though such a demise would not pass any legal interest in the premises for the term specified, yet the lessee was considered as holding from year to year, and on such of the terms of the agreement as were consistent with that tenancy (*b*); but, at the present day, such a demise (being good in equity as an agreement to demise) confers an equitable interest in the term, and not merely a legal interest from year to year (*c*).

It is to be observed that where a tenancy "by the year" or "from year to year" is once created it cannot, on either side, be put an end to without half a year's *notice to quit* from one party to the other, such notice expiring with the current year of the tenancy (*d*); though if the tenancy commenced at one of the usual quarterly feast days, the

"month to month," or "week to week;" and such tenancies are determined by reasonable notice, which notice is, *e. g.*, usually a month or a week, as the case may be. (See *Jones v. Mills*, 10 C. B., N. S. 800; also *Bowen v. Anderson*, 1894, 1 Q. B. 164, disapproving *Sandford v. Clarke*, 21 Q. B. D. 398.)

(*z*) *Richardson v. Langridge*, 4 Taunt. 128; *Wilkinson v. Hall*, 3

Bing. N. C. 508.

(*a*) *Doe d. Lord v. Crago*, 6 C. B. 90.

(*b*) *Tress v. Savage*, 4 Ell. & Bl. 36, 42.

(*c*) *Walsh v. Lonsdale*, 21 Ch. D. 9; *Swain v. Ayres*, 20 Q. B. D. 585; 21 Q. B. D. 289.

(*d*) *Doe v. Smith*, 5 Ad. & El. 351; *Doe v. Stanion*, 1 Mee. & Wels. 691.

half year may be computed from one of such feast days to another—as from Midsummer to Christmas—whether there be 182 days between them or not (*e*). And it follows, therefore, that a lease “from year to year” will necessarily confer an estate for one year certain, at the outset (*f*); and if in that or any succeeding year of the tenancy, more than half a year should elapse without a notice to quit being given by either of the parties, another year certain is thereby constantly added to that which is in progress (*g*). Upon the same principle, if the lease be “for a year, and so from year to year,” it will enure as a demise for *two years* certain, at the outset; for at the expiration of the first year, there is a continuation of the tenancy, which cannot be determined by a notice to quit at an earlier period than the expiration of the second year (*h*). Moreover, this estate does not determine by an assignment of the interest of either of the parties, or by their death: but the tenancy will continue to exist between one of the parties and the assigns or representatives of the other; or between the assigns or representatives of both parties (as the case may be), until duly determined by the usual notice to quit (*i*). And the tenant from year to year, or for years, where the demise comprises a house, seems bound to keep it in weather-tight condition, and consequently will be answerable for such permissive waste as may arise by his neglect to do so (*j*).

(*e*) *Doe v. Watkins*, 7 East, 551; *Roe v. Doe*, 6 Bing. 574. It may be here remarked that in *farm* leases coming within the Agricultural Holdings Act, 1883, re-enacting a similar provision in the Agricultural Holdings Act, 1875, a *year's* notice, expiring with the current year of the tenancy, is now made necessary in lieu of the old half-year's notice (38 & 39 Vict. c. 92, s. 51; 46 & 47 Vict. c. 61, s. 33 *Wilkinson v. Calvert*, 3 C.

P. D. 360; *Barlow v. Teal*, 15 Q. B. D. 403.

(*f*) *Doe d. Cornwall v. Matthews*, 11 C. B. 675.

(*g*) *Stapylton v. Clough*, 2 Ell. & Bl. 983; *Hogg v. Brooks*, 15 Q. B. D. 256.

(*h*) *Denn v. Cartwright*, 4 East, 32.

(*i*) *Doe v. Porter*, 3 T. R. 13; *Buckworth v. Simpson*, 5 Tyr. 354.

(*j*) *Yellowly v. Gower*, 11 Exch. 274; *Davies v. Davies*, 38 Ch. Div.

II. An estate at will (*k*) is where lands and tenements are let by one man to another to have and to hold at the will of the lessor, and the tenant by force of this lease obtains possession (*l*). It may be constituted by written or verbal agreement without further ceremony, if followed by entry; and may in some cases arise by mere construction of law. [Tenant at will hath no certain indefeasible estate; nothing that can be assigned by him to any other: because the lessor may determine his will, and put him out whenever he pleases. But every estate at will is at the will of both parties, landlord and tenant; so that either of them may determine the will, and quit his connexion with the other, at his own pleasure (*m*). Yet this must be understood with some restriction. For, if the tenant at will sows his land, and the landlord, before the corn is ripe or before it is reaped, puts him out: yet the tenant shall have the emblements; and free ingress, egress, and regress to cut and carry them away (*n*). And this for the same reason upon which all the cases of emblements turn, viz. the point of uncertainty, since the tenant could not possibly know when his landlord would determine his will, and therefore could make no provision against it; and having sown the land upon a reasonable expectation or presumption, the law will not suffer him to be a loser by it. But it is otherwise, and upon reason equally good, where the tenant himself determines the will; for in this case the landlord shall have the profits of the land (*o*).]

The liability of a tenant at will, in regard to voluntary waste, is similar to that of tenant for years (*p*); but he is not liable for permissive waste (*q*).

[What act does, or does not, amount to a determination of the will on either side, is next to be considered; and

499; *Avis v. Newman*, 41 Ch. D.
432.

(*k*) Co. Litt. 55 a—57 b.

(*l*) Litt. s. 68.

(*m*) Co. Litt. 55 a—57 b,

(*n*) Ibid. 56 a.

(*o*) Ibid. 55 b.

(*p*) Ibid. 57.

(*q*) *Harnett v. Maitland*, 16 Mee.
& W. 257.

[it is now settled, that not only the express determination of the lessor's will (as by notice given to the lessee that he shall hold no longer), but also the exertion of any act of ownership by the lessor, without the lessee's consent, puts an end to the estate at will (*r*); as, for example, the landlord's entering upon the land and cutting timber, or carrying away stone (*s*), or taking a distress for rent and impounding it on the premises (*t*). And the same consequence will follow if the lessee should commit waste (*u*), or do any act of desertion, such as assigning the estate, which is inconsistent with his tenure. Also, which is *instar omnium*, should either the lessor or the lessee die or be outlawed (*x*).

The law, however, is careful that no sudden determination of the will by one party, shall tend to the manifest and unforeseen prejudice of the other. This appears in the rule as to emblements before mentioned; and, by parity of reason, the lessee, after the determination of the lessor's will, shall have reasonable ingress and egress to fetch away his goods and utensils (*y*). And if rent be payable quarterly or half-yearly, and the lessee determines the will, the rent shall be paid to the end of the current quarter or half-year (*z*). Moreover, upon the same principle, courts of law have leaned as much as possible against construing demises, where no certain term is mentioned, to be tenancies at will (*a*); but have rather held them to be *tenancies from year to year so long as both parties please*—a species of estate which we have already noticed.]

III. An estate at sufferance is where one comes into possession under a lawful demise, and, after such demise

(*r*) Co. Litt. 57; *Henchman v. Iles*, 1 Ventr. 248.

(*s*) *Turner v. Doe d. Bennett*, 9 M. & W. 643.

(*t*) Co. Litt. 57 b.

(*u*) *Ibid.* 57 a.

(*x*) *Oland's case*, 5 Rep. 116 b; Co. Litt. 57 b, 62 b.

(*y*) Litt. s. 69.

(*z*) *Leighton v. Theed*, 2 Salk. 414; *Kighly v. Bulkly*, 1 Sid. 339.

(*a*) *Doe v. Cox*, 11 Q. B. 122.

is ended, nevertheless continues the possession (*b*). [As if a man takes a lease for a year, and, after the year is expired, continues to hold the premises, without any fresh lease from the owner of the estate. Or, if a man maketh a lease at will, and die, the estate at will is thereby determined; but if the tenant continueth in the possession, he is tenant at sufferance (*c*). But no man can be tenant at sufferance under the king, to whom no *laches*, or neglect, in not entering and ousting the tenant, is ever imputed by the law; but his tenant, so holding over, is considered as an absolute intruder (*d*). And in the case of a subject, this estate may be destroyed whenever the true owner shall make an actual entry on the lands, and oust the tenant, doing so peaceably; but, before entry, he cannot maintain an action of trespass against him, as he might against a stranger (*e*); and the reason is, because the tenant being once in by a lawful title, the law, (which presumes no wrong in any man,) will suppose him to continue upon a title equally lawful, unless the owner of the land, by some public and avowed act—such as entry—will declare the continuance to be tortious, or, in common language, wrongful.]

We may here observe generally that in the case of a lease for years, as well as in that of a lease for life, or gift in tail, a tenure of the imperfect kind is created between the lessor and the lessee; and the latter holds of the former by the nominal obligation of fealty, and by such services as are reserved; but it is otherwise as to a tenant at will or at sufferance, from neither of whom is any fealty due, the tenant at will not having “any sure estate” (*f*),

(*b*) Co. Litt. 57 b, 271 a; 2 Inst. 134.

(*c*) Co. Litt. 57 b.

(*d*) Co. Litt. ubi sup.; and see n. (4), by Harg.

(*e*) Trevellian v. Andrew, 5 Mod. 384.

(*f*) Co. Litt. 93 a, 93 b; 63 a, 68 b, n. (5), by Harg.; Denn v. Fernside, 1 Wils. 176.

and the tenant at sufferance not having any estate at all, but a mere “possession without privity” (*g*).

We may conclude this chapter with some slight statement of the law relative to long terms of years,—their creation, extinction, and enlargement into the fee simple estates.

Long terms of years might be (and at one time very commonly were) created in lands by way of giving a security for money lent, where it was not desired to mortgage the fee simple; and such terms may still be created for that purpose in a proper case (*h*). Such terms of years have also at all times been, and still are, commonly created in settlements and wills, for securing pin-money to wives, jointure to widows, and portions to the younger children of the marriage. It is obvious that when the purposes for which these terms were created were satisfied, the terms themselves might be called, and they were commonly called, satisfied terms of years; and they ought properly to have ceased, and occasionally under an express proviso in that behalf (called a proviso for *cesser*) they did in fact cease. However, they were more commonly kept alive. Thus, upon the purchase of real property, where the land held in fee had been mortgaged for a long term of years, and upon the purchase the mortgagee was paid off out of the purchase-money, it was usual for the purchaser (instead of taking a surrender of the term to himself, and so merging it in the inheritance) to keep it on foot and have it assigned to a trustee of his own nomination, in trust for himself (the purchaser), “to attend and protect the inheritance,” that is to say, to follow and be held upon all the limitations of the inheritance (*i*), so that for all practical purposes the case

(*g*) Co. Litt. 270 b.

(*h*) Lillingston v. Pares, 12 Ch. Div. 333.

(*i*) Best v. Stamford, Prec. Ch. 252; 2 Freem. 288, S. C.; Wray v. Williams, 1 P. Wms. 137; 1 Sand. 229; Cooke v. Cooke, 2 Atk. 67.

was the same as if it had merged in the inheritance; while, on the other hand, it afforded the purchaser a security which he would not have had if a merger had actually taken place; for if it afterwards turned out that prior to the purchase, but posterior to the creation of the term, there had been an intermediate alienation or incumbrance of the fee in favour of another person, of which the subsequent purchaser had no notice when he took his conveyance and paid his purchase-money, he would be protected against it, through the medium of the term: for the term would have priority over such intermediate alienation or incumbrance, and, being assigned expressly in trust for the purchaser, it became, for all beneficial purposes, his property; but no such protection resulted from such satisfied term where the precaution of thus assigning it had been in any particular purchase neglected; for the mortgage term, if left outstanding and not assigned, would not be held in trust for the second purchaser at all. The protection afforded by the assignment of such satisfied terms often occasioned prejudice to innocent persons, and the necessity for their assignment to ensure that protection on every individual purchase was fraught with expense; and eventually, therefore, by the Satisfied Terms Act, 1845 (8 & 9 Vict. c. 112) (*j*), it was enacted, regarding such long terms of years, that such of them as should, either by express declaration or by construction of law, on the 31st December, 1845, be attendant upon the inheritance or reversion of any lands, should on that day absolutely cease and determine as to the land upon the inheritance or reversion whereof they should be so attendant; with a proviso, however, that every such term of years made so attendant by *express declaration* (although by the Act made to cease and determine), should afford to

(*j*) Doe *d.* Hall *v.* Mouldsdale, 16 Mee. & W. 689; Plant *v.* Taylor, 7 H. & N. 211; Shaw *v.* Johnson, 1

Dr. & Sm. 412; Anderson *v.* Pig-net, Law Rep. 8 Ch. App. 180.

every person the same protection as it would have afforded him if it had continued to subsist, but had not been assigned or dealt with after 31st December, 1845, and should, for the purpose of such protection, be considered both at law and in equity to be a subsisting term; and with regard to all such terms of years (then subsisting or thereafter to be created) becoming satisfied after the 31st December, 1845, the same statute enacted, that such of them as should, either by express declaration or by construction of law, become attendant upon the inheritance or reversion of any lands, should, immediately on the same becoming so attendant, absolutely cease and determine as to the land upon the inheritance or reversion whereof such terms should become so attendant.

On the other hand, long terms of years may now in certain cases, and under the provisions contained in the Conveyancing Acts, 1881 (*k*) and 1882 (*l*), be enlarged into fee simple estates. The terms which may be so enlarged are terms which in their first creation were of not less than 300 years, and of which not less than 200 years remain unexpired, and which are without any trust or equity of redemption in favour of the freeholder or other reversioner, and also without any rent or with merely a peppercorn or other like nominal rent, or the rent of which (not having been of that class) has been since released, barred, or otherwise lost; also, the terms must not be liable to be determined for condition broken; and if they are sub-terms, the superior term (as well as the sub-term) must answer the above description. The enlargement is by simple declaration by deed to the effect that the term shall be enlarged; and the person to make the declaration is (substantially) the person legally and beneficially

(*k*) 44 & 45 Vict. c. 41, s. 65.

(*l*) 45 & 46 Vict. c. 39, s. 11; *Re Chapman & Hobbs*, 29 Ch. Div. 1007 (where one penny was held to

be a nominal rent); and *Re Smith & Stott*, *ibid.* 1009, n. (where three shillings was held to be a rent having some money value).

entitled to the term, subject or not subject to any incumbrance. The fee simple substituted for the term is subject to all the same estates, rights, and interests as the original term; and it carries the mines and minerals, unless these have already become, by severance, express exception, or otherwise, a separate inheritance.

CHAPTER VI.

OF ESTATES UPON CONDITION.

[OF estates, there is yet another species still remaining, called an estate *upon condition* (*a*) ; being such whose existence depends upon the happening or not happening of some uncertain event, whereby the estate may be either originally created, or enlarged, or defeated (*b*). And these conditional estates have been reserved till now, because they are indeed more properly qualifications of other estates, than a distinct species of themselves ; seeing that any quantity of interest—a fee, a freehold, or a term of years—may depend upon these conditions. These estates, thus understood, are either upon condition implied in law, or upon condition expressed in the grant itself.

(1.) Estates upon condition *implied*, are where a grant of an estate has a condition annexed to it by the law, inseparably from its essence and constitution, although no condition be expressed in words. As if a grant be made to a man of an “office” generally, without adding other words, the law tacitly annexes thereto a secret condition, that the grantee shall duly execute his office (*c*) ; on breach of which condition, it is lawful for the grantor, or his heirs, to oust him, and grant it to another person (*d*). “Franchises,” also, or regal privileges in the hands of a subject,

(a) Co. Litt. 201 a.—237 a.

(c) Litt. s. 378 ; Bartlett v.

(b) Lord Stafford's case, 8 Rep.

Downes, 3 Barn. & Cress. 619.

(d) Litt. s. 317.

[are held to be granted on the same implied condition of making a proper use of them; and therefore they may be forfeited, like offices, either by abuse or by neglect (*e*). Indeed, it is the same principle which underlies all the forfeitures of estates for acts done by the tenant which are incompatible with his estate; as if tenant for life or years enfeoffs a stranger in fee simple: this, *by the common law*, was a forfeiture of his estate, being a breach of the condition which the law annexed thereto, viz. that he should not attempt to create a greater estate than he himself was entitled to.]

(2.) Estates on condition *expressed* in the grant itself, are where an estate is granted—either in fee simple or otherwise—with an expressed qualification or condition annexed (*f*), whereby the estate granted shall either commence (*g*), be enlarged (*h*), or be defeated (*i*), upon performance or breach of such qualification or condition. And these conditions (commonly called conditions in *deed*) are either “precedent,” that is, such as must happen or be performed before the estate can vest or be enlarged; or “subsequent,” that is, such as by the failure or non-performance of which, an estate already vested may be defeated. [Thus, if a man grant to his lessee for years, that upon payment of a hundred marks within the term he shall have the fee, this is a condition precedent, and the fee simple passeth not till the hundred marks be paid (*k*). But if a man grant an estate in fee simple, reserving to himself and his heirs a certain rent, and that, if such rent be not paid at the times limited, it shall be lawful for him and his heirs to re-enter and avoid the estate: in this case, the grantee and his heirs have an estate upon condition

(*e*) Earl of Shrewsbury’s case,
9 Rep. 50.

(*f*) Co. Litt. 201 a.

(*g*) Co. Litt. 216 a—218 b.

(*h*) Lord Stafford’s case, 8 Rep.
11; Fearn, by Butler, 279, 9th ed.

(*i*) Co. Litt. 214 b, 215 a.

(*k*) Co. Litt. 217 b; Lord Staf-
ford’s case, 8 Rep. 73 b.

[subsequent ; and such estate is defeasible, if the condition be not strictly performed (*l*).]

Besides these estates on condition subsequent, there are also estates created by way of conditional limitation (*m*) ; that is to say, where an estate is so expressly defined and limited by the words of its creation, that it cannot endure for any longer time than till the contingency happens upon which the estate is limited. To this class may be referred all base fees, and fees simple conditional at the common law. [Thus, an estate to a man and his heirs, tenants of the manor of Dale, is an estate in fee on condition that he and his heirs continue tenants of that manor. And so, if a personal annuity be granted to a man and the heirs of his body, as this is no tenement within the statute of Westminster the second, it remains, as at common law, a fee simple on condition that the grantee has heirs of his body ; and upon the same principle depend all the determinable estates of freehold, already mentioned : as *durante viduitate*, &c. : these are (in effect) estates for life upon condition that the grantees do not marry, and the like.

There is some resemblance, no doubt, between conditional limitations and estates depending on conditions subsequent ; but the difference between them is great ; for in the case of a conditional limitation, (as when land is granted to a man, *so long as* he is parson of Dale, or *while* he continues unmarried, or *until* out of the rents and profits he shall have made 500*l*. and the like,) the estate determines as soon as the contingency happens, and the estate in remainder, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy ; whereas, in the case of an estate upon condition in deed (as if an estate be granted expressly upon condition to be void upon the payment

(*l*) Litt. s. 325.

(*m*) Co. Litt. 234 b ; Mary Portington's case, 10 Rep. 40 b, 41 b.

[of 40/. by the grantor, or *so that* the grantee continues unmarried, or *provided* he goes to York, &c.,) the law permits it to endure beyond the time when such contingency happens, unless the grantor or his heirs takes advantage of the breach of the condition, and makes an entry in order to avoid the estate (*n*).] As to the necessity of entry, however, in such a case, there is a diversity (says Lord Coke) between a condition annexed to a freehold and a condition annexed to a lease for years (*o*); for if a lease for years be made on condition that if the lessee goes not to Rome before such a day the lease shall be void, the lease is *ipso facto* void upon the breach of the condition, without any entry by the lessor; but if the lease is for life, an entry is necessary to defeat it (*p*).

The right of entry on breach of a condition subsequent could not, at the common law, be reserved in favour of a stranger, but only of the grantor or his heirs; and the effect of entry by him or them, after breach, was to defeat altogether the estate which had before passed to the grantee; so that the grantor or his heirs were *in* again as of their former seisin (*q*). It was also a rule of the common law that the right of entry on breach could not be assigned in any case to a stranger (*r*), so that if a man had made a lease for life, reserving a rent, with proviso for re-entry in case of non-payment, and the lessor granted over his reversionary estate to another, the latter could take no benefit from the condition (*s*). But by the statute 32 Hen. VIII. c. 34 (*t*), the law in this respect was altered, and the grantee of the reversion, upon a lease for life or years, it was thereby enacted, should have the same

(*n*) Litt. s. 327, 331; 32 Hen. 8, c. 34; Brooke *v.* Spong, 15 Mee. & W. 153.

(*o*) Roberts *v.* Davey, 4 Barn. & Adol. 664; Hill *v.* Kempshall, 7 C. B. 975.

(*p*) Co. Litt. 214 b; Doe *v.* Pritchard, 5 Barn. & Adol. 765.

(*q*) Fearn, by Butler, 381, n. (*a*), 9th ed.; Davis *v.* Eytton, 7 Bing. 154.

(*r*) Litt. s. 347.

(*s*) Co. Litt. 215 a.

(*t*) Thursby *v.* Plant, 1 Saund. by Wms. 237; Wright *v.* Burroughes, 3 C. B. 685.

benefit of a condition, in case of a subsequent breach, as the grantor himself would have had—provided that such condition related to the payment of rent, the restriction from waste, or other like object tending to the benefit of the reversionary interest (*u*) ; and this provision has been extended by the statutes 22 & 23 Vict. c. 35, s. 3, and 44 & 45 Vict. c. 41, ss. 10—12, to the severance of the reversionary estate, the conditions being thereby apportioned. As regards *conditional limitations*, a stranger (*i. e.*, even an assignee of the original grantee of the estate in remainder or expectancy) could in all cases have taken advantage of these, even without the aid of the statute of Henry VIII. ; for, as regards these limitations, they are spent and determined when the condition happens, and the next estate comes into possession, whether it be a reversion or an expectancy upon, or a remainder after, the conditional limitation, and in whomsoever such reversion or remainder may then be vested (*x*).

[In all instances of estates upon express condition, it is to be observed that so long as the condition remains unbroken the grantee may have an estate of freehold ; for the breach of the condition being contingent and uncertain, this uncertainty preserves the freehold, and the estate may last for ever, or at least for the life of the tenant, supposing the condition to remain unbroken (*y*). But where the estate is at the utmost a chattel interest, which must determine at a time certain, and may determine sooner (as a grant for ninety-nine years, provided A., B., and C., or the survivor of them, shall so long live), this still continues a mere chattel, and is not, by reason of such its uncertainty, ranked among estates of freehold.

These express conditions are void if they be *impossible* at the time of their creation, or afterwards become impossible by the act of God or by the act of the grantor himself ; or if they *be contrary to law*, or repugnant to the

(*u*) Co. Litt. 205 b.

ington's case, 10 Rep. 42.

(*x*) Co. Litt. 214 b ; Mary Port-

(*y*) Co. Litt. 42 a.

[nature of the estate. In any of which cases, if they be conditions *subsequent*, that is, to be performed after the estate is vested, the estate shall be absolute at once, and the condition subsequent discharged. As, if a feoffment be made to a man in fee simple, on condition that unless he goes to Rome in an hour, or unless he marries with Jane S. by such a day (within which time the woman dies, or the feoffor marries her himself); or unless he kills another; or in case he alienes in fee; that then and in any of such cases, the estate shall be vacated and determined: here the condition is void, and the estate is at once made absolute in the feoffee; for he hath by the grant the estate vested in him, which shall not be defeated afterwards by a condition either impossible, illegal, or repugnant (z). But if the condition be *precedent* or to be performed before the estate vests, as a grant to a man that if he kills another or goes to Rome in an hour, he shall have an estate in fee; here, the void condition being precedent, the estate which depends thereon is also void, and the grantee shall take nothing by the grant; for he hath no estate until the condition be performed (a).]

On the other hand, even where the condition is valid and capable of being enforced, it is also capable of being waived by the grantor at his pleasure (b); and as the law always leans against forfeitures (c), it will consider him as having waived his right to enter for breach of a condition subsequent, if, after notice of the breach committed, he does any act inconsistent with an intention to avail himself of the forfeiture. Thus, if a lease be made with a proviso that, in the event of the lessee's assigning his interest, the lessor shall be at liberty to enter on the land demised, as of his former estate; he will nevertheless not be entitled to enter, if, after an assignment made, he accepts rent

(z) Co. Litt. 206 a; Clifford v. Scott, 6 C. B. (N. S.) 179.

Watts, Law Rep., 5 C. P. 577; (b) Co. Litt. 218 a.

Rosher v. Rosher, 26 Ch. Div. 801. (c) Ibid 206 b; Clay v. Bowler,

(a) Co. Litt. 206 a; Shrewsbury 5 Ad. & Ell. 403, n.

from the assignee (*d*). By a modern enactment however (23 & 24 Vict. c. 38, s. 6), an actual waiver of the benefit of any covenant or condition in a lease by the lessor shall not (in the absence of any intention appearing to that effect) be assumed to extend to any breach other than that to which the waiver specially relates, nor to operate as a general waiver of the covenant or condition in question (*e*); and, of course, there can be no waiver of a continuing breach; but the covenant or condition may be released altogether.

Such being the general nature of estates upon condition, specific notice is due to certain specific varieties of them, principally three in number, namely, mortgage estates, estates by statute merchant and statute staple, and estates by elegit.

And, firstly, as to mortgage estates:—These were of two kinds, being either *vivum vadium*, or *mortuum vadium*.

[*Vivum vadium*, a term not now much in use, was when a man borrowed a sum (suppose 200*l.*) of another, and granted him an estate, as of 20*l. per annum*, to hold till the rents and profits should repay the sum so borrowed; that is to say, an estate conditioned to be void, as soon as such sum was raised. And in this case, the land or pledge was said to be living: it subsisted and survived the debt; and immediately on the discharge of the debt, it resulted back to the borrower (*f*). But *mortuum vadium*, or *mortgage*, is where a man borrows of another a sum and grants him an estate in fee or for a less interest, on condition that if he, the mortgagor, shall repay the mortgagee the said sum (generally with interest thereon at a fixed rate)

(*d*) Co. Litt. 211 b; Doe *v.* Lewis, 45 Vict. c. 41, s. 14; 55 & 56 Vict. 5 Ad. & Ell. 277; Hartshorne *v.* c. 13, ss. 2, 4.
Watson, 4 Bing. N. C. 178.

(*e*) 15 & 16 Vict. c. 76, s. 210; (f) Co. Litt. 205 a; Fenwick *v.* Reed, 1 Meriv. 119; Flory *v.* Denny, 7 Exch. 581.
22 & 23 Vict. c. 35, ss. 1—3, 4—9;
23 & 24 Vict. c. 126, ss. 1, 2; 44

ance the estate vests in his legal personal representative as if it were a chattel real
withstanding any testamentary disposition by him.
but this does not apply to copyhold lands. In such case the subject of the mortgage is
the heir-at-law or devisee, who will hold as trustee for the pr

[on a certain day mentioned in the deed, that then the mortgagor may re-enter on the estate so granted; or, as is now the more usual way, that then the mortgagee shall re-convey the estate to the mortgagor. In this case the land is by law, in case of non-payment at the time limited, for ever dead and gone from the mortgagor; and the mortgagee's estate in the lands is then no longer conditional, but absolute: but so long as it continues conditional, that is, between the time of lending the money and the time allotted for re-payment, the mortgagee is called tenant in mortgage (*g*).]

We are now speaking, it is to be understood, only of a legal mortgage by conveyance, and not of an equitable mortgage by mere deposit of title deeds, which latter mortgage may be created without any conveyance, and even without any writing; and in the case of a legal mortgage by conveyance, so soon as the estate in mortgage is created, the mortgagee, in the absence of any stipulation to the contrary, may enter on the lands, being, however, bound to restore them upon payment of the mortgage money on the day limited; and therefore it is usual to insert a proviso that the mortgagor shall hold the land till default on the day assigned for payment, on which default happening, if not sooner, the mortgagee is entitled to enter and take possession; nor do the principles of law admit of his being afterwards evicted by the mortgagor (*h*); and on this entry by the mortgagee, if there is a tenant in possession, under a lease *prior* to the mortgage, his possession cannot of course be disturbed, but he pays over his rents to the mortgagee; and if there be a tenant in possession under a lease granted by the mortgagor *subsequently* to the mortgage, and without the privity of the mortgagee, he may be ejected without notice, unless indeed such subsequent lease was made

(*g*) Litt. s. 332.

(*h*) Doe *v.* Maisey, 8 Barn. & Cress. 767; Partington *v.* Wood-

cock, 6 Ad. & El. 695; Russell *v.* Russell, 1 Bro. C. C. 269.

under and in conformity with the Conveyancing Act, 1881 (*i*) ; and in any case he is entitled, on the determination of his tenancy, to the like right against the mortgagee which he had against the mortgagor for compensation for his tenant right or valuation (*k*).

But, though a mortgage be thus forfeited on such default, and the estate thereupon becomes absolutely vested at law in the mortgagee, yet in equity the mortgagor will be allowed to recall, i.e., redeem, his estate, on paying to the mortgagee his principal, interest, and expenses ; for otherwise, in strictness of law, an estate worth 1,000*l*. might be forfeited for non-payment of 100*l*. or a less sum ; and six months' notice must, in general, be given of the mortgagor's intention to redeem, or else six months' interest must, in general, be paid in lieu of giving such notice (*l*). It is, however, provided by the 37 & 38 Vict. c. 57, the Real Property Limitation Act, 1874 (which came into operation on the 1st January, 1879), that a mortgagor shall not be entitled to redeem but within *twelve* (formerly twenty) *years* next after the time that the mortgagee shall obtain possession or receipt of the profits of the land mortgaged or of the rent : unless indeed an acknowledgment in writing shall in the meantime have been given by the mortgagee of the right of the mortgagor, in which case the period of twelve years for redemption commences to run anew from such acknowledgment ; and in favour of a mortgagee who has not obtained possession, it is enacted by 7 Will. IV. & 1 Vict. c. 28 (as amended by the same Real Property Limitation Act, 1874), that any person, entitled to or claiming under any mortgage of land, may make an entry or bring an action or suit to recover the land within twelve (formerly twenty) years next after the last payment of any part of the principal or interest secured by such mortgage ;—and this he may do although more

(*i*) 44 & 45 Vict. c. 41, s. 18.

(*k*) 53 & 54 Vict. c. 57.

(*l*) *Shrapnell v. Blake*, 2 Eq. Ca.

Ab. 34 ; *Prescott v. Phipps*, 23 Ch.

Div. 372 ; *Fitzgerald's Trustee v.*

Mellersh, 1892, 1 Ch. 385.

than twelve years may have elapsed since his right to enter or sue shall have first accrued (*m*).

The estate of the mortgagor, after default, is called his *equity of redemption*; and while his equity of redemption continues, the *mortgagor* is regarded in equity as the owner of the estate, subject only to the mortgage debt: and on his death the mortgaged estate comes to his devisee (or heir) encumbered with this debt; and before “*Locke King’s Acts*” (17 & 18 Vict. c. 113, 30 & 31 Vict. c. 69, and 40 & 41 Vict. c. 34), the estate so encumbered and devised or descending was in general entitled to be discharged of the debt, at the expense of the *personal* estate of the deceased mortgagor (*n*); but these acts have now altered the law in that particular. The mortgagor desiring to discharge the mortgage debt may take proceedings “to redeem” in a court of equity (*o*); and if the mortgagee be not in possession, this proceeding merely calls upon the mortgagee to reconvey on payment of principal, interest, and costs: but if the mortgagee has obtained possession, it asks that an account may be taken of all the rents and profits on the one hand, and of the principal, interest, and costs on the other; and that, on payment of what may appear due on such account, a reconveyance may be made, and the possession of the premises restored (*p*); and by 37 & 38 Vict. c. 78, s. 4, the legal *personal representative* of the mortgagee might, on payment of the moneys secured by the mortgage, have reconveyed the mortgaged estate; but that section of this Act was repealed by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41, s. 30), which last-mentioned Act has enacted that such personal representative *shall* (not merely *may*) in such a

(*m*) *Doe d. Palmer v. Eyre*, 17 Q. B. 366; *Pugh v. Heath*, 7 App. Ca. 235.

(*n*) *Brownson v. Lawrance*, Law Rep., 6 Eq. Ca. 1; *Nelson v. Page*, ib., 7 Eq. Ca. 25; *Sackville v.*

Smyth, ib., 17 Eq. Ca. 153.

(*o*) *Scotto v. Heritage*, Law Rep. 3 Eq. Ca. 212.

(*p*) *Parkinson v. Hanbury*, Law Rep., 2 H. of L. Ca. 1.

case reconvey the estate, and that whether the mortgagee die testate or intestate.

On his part also, the mortgagee, where his debt remains unpaid for more than a reasonable time after the time agreed on, may (although the time for redeeming be still running) take proceedings in equity,—*scilicet*, proceedings “for foreclosure,” calling upon the mortgagor to redeem his estate presently, or in default thereof to be for ever *foreclosed* from redeeming the same; that is, to lose his equity of redemption without possibility of recall (*q*); and in such proceedings, the Court may direct a sale of the property (*r*). And in some cases of fraudulent mortgages (*s*), such as twice mortgaging the same lands without giving notice of the mortgage already effected, the fraudulent mortgagor forfeits all equity of redemption whatsoever. And where there are successive mortgages on estates, each mortgagee, ignorant of the other incumbrances, the maxim *qui prior est tempore, potior est jure*, in general prevails, where all the mortgages are equitable (*t*); but preference is given, in the general case, to the mortgagee in possession of the legal estate (*u*). The mortgagee may also bring the estate to sale in satisfaction of his debt, (paying over the surplus proceeds, if any, to the mortgagor,) even without resorting to proceedings in equity, and without any concurrence on the part of the mortgagor (*v*), provided the security be taken in such form as to authorize that course of proceeding, and which is usually a deed; and even if no power of sale be conferred by the express terms of the instrument, the mortgagee may still bring the estate to sale in such manner as is provided by the Conveyancing Act, 1881, 44 & 45 Vict. c. 41, ss.

(*q*) *Campbell v. Holyland*, 7 Ch. D. 166.

(*r*) 15 & 16 Vict. c. 86, s. 48; *Newman v. Selfe*, 33 Beav. 522; and 44 & 45 Vict. c. 41, s. 25.

(*s*) 4 & 5 W. & M. c. 16.

(*t*) *Jones v. Jones*, 8 Sim. 633; *Wilmot v. Pike*, 5 Hare, 14.

(*u*) *Goddard v. Complin*, 1 Ch. Ca. 119.

(*v*) *Corder v. Morgan*, 18 Ves. 344.

19—21, which act confers also other powers on mortgagees, as to insure and to appoint a *receiver*, who shall receive the rents and profits as agent of the person entitled to the property subject to the charge (*x*).

It forms one of the provisions of the Judicature Act, 1873, that a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land, as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises on a lease or other contract made by him jointly with any other person (*y*).

The state of the law, as above explained, with respect to mortgages, affords the reader an example of the distinction referred to in a former place between *legal* and *equitable* estates; at law, the ownership of the land is considered as absolutely vested, on the mortgagor's default, in the mortgagee; but in equity, the mortgagor continues to be, and to be regarded as, the true owner until a foreclosure shall have taken place (*z*).

Secondly, estates by *statute merchant* and *statute staple* (*a*):—[These are nearly related to the *vivum vadium* before mentioned; for both the statute merchant and the statute staple are securities for money; the one entered into before the chief magistrate of some trading town, pursuant to the statute 13 Edw. I., *De mercatoribus*, and thence called a statute merchant: the other pursuant to the statute 27 Edw. III. stat. 2, c. 9, before the mayor of the "staple"; that is to say, the grand mart for the principal commodi-

(*x*) 44 & 45 Vict. c. 41, ss. 19—

Ab. 728.

24.

(*y*) 36 & 37 Vict. c. 66, s. 25 (5).

(*a*) 2 Inst. 322; 2 Saund. by Wms. 69 c, n. (3); Reeves's Hist.

(*z*) *Casborn v. Scarfe*, 2 Eq. Ca.

Eng. Law, vol. ii. pp. 161, 393.

[ties or manufactures of the kingdom, formerly held by Act of Parliament in certain trading towns: from whence this security was called a statute staple. They are both securities for debts acknowledged to be due, and were originally permitted only among traders for the benefit of commerce; and, when entered into, not only the body of the debtor might be imprisoned, and his goods seized in satisfaction of the debt, but also his lands might be taken by the creditor, till out of the rents and profits of them the debt was satisfied; and, during such time as the creditor so held the lands, he was termed tenant by statute merchant or statute staple.] The benefit of this mercantile transaction was afterwards, by virtue of the statute 23 Hen. VIII. c. 6, extended to all the king's subjects, whether traders or not; and such recognizance *in the nature* of a statute staple was directed by the Act to be acknowledged before either of the chief justices, or (out of term) before their substitutes, the mayor of the staple at Westminster and the recorder of London; and to be enrolled and certified into chancery.

Thirdly, the estate by *elegit*:—[What an *elegit* is, and why it is so called, will be fully explained in a subsequent part of this work (*b*). At present it is sufficient to mention that it is the name of a writ, founded on the statute of Westminster the second (*c*), by which, after judgment in an action has been obtained, the sheriff gives the judgment creditor possession of the lands and tenements of the opposite party, to be occupied and enjoyed until the money due on such judgment is fully paid; and during the time the judgment creditor so holds the lands, he is called tenant by *elegit*, his estate being a mere conditional estate, defeasible as soon as the judgment debt is levied (*d*).] And by this writ, at one period, only one-half of the

(*b*) Vide post, bk. v. c. x.

(*d*) *Dighton v. Greenvil*, 2 Vent.

(*c*) 13 Ed. 1, c. 18; Hist. Eng. Law, by Reeves, vol. ii. p. 187.

327; *Price v. Varney*, 3 Barn. & Cress. 733.

lands and tenements of the judgment debtor could be seized in execution, the statute of Westminster the second (A.D. 1285) not extending (just as voluntary alienation did not then extend (*e*)) to the whole of his lands, but permitting them to be only partially affected by the process of law for his ordinary debts (*f*); though, on the other hand, by the statute *De mercatoribus*, passed in the same year, the *whole* of a man's lands were made liable on a statute merchant, for a debt contracted in trade. So much more readily did the feudal restraint on alienation yield to considerations of a commercial kind, than to any others. And such continued to be the state of the law as to the writ of *elegit*, until the modern statute 1 & 2 Vict. c. 110, which for the first time enabled the judgment creditor to seize by that writ the *whole* of the judgment debtor's lands and tenements (*g*).

[And regarding all these estates by statute merchant, statute staple, and *elegit*, and also (since the Conveyancing Act, 1881) regarding even the mortgagee's estate, though the tenants are said to hold *ut liberum tenementum* until their claims are satisfied, yet are their estates but chattels, and pass to their *personal representatives* (*h*): which is probably owing to this: that, being a security and remedy provided for personal debts due to the deceased, to which debts his personal representative is entitled, the law has therefore thus directed their succession; as judging it reasonable from a principle of

(*e*) Wright's Ten. 154.

(*f*) 13 Ed. 1, c. 18.

(*g*) 1 & 2 Vict. c. 110, s. 11. The same statute (s. 18), and 27 & 28 Vict. c. 112, s. 2, provide, in effect, that decrees and orders and rules of court (including such as are made in equity, lunacy, or bankruptcy), "whereby any money shall be payable to any person," shall

have the effect of *judgments* in actions; and the persons to whom money is thus payable are consequently, as judgment creditors, entitled to become *tenants by elegit*. See further as to an *elegit*, post, bk. v. c. x.

(*h*) Co. Litt. 42 a, 43 b; 2 Inst. 322.

[natural equity, that the security and remedy should be vested in those to whom the debts, if recovered, would belong. And, upon the same principle, if lands be devised to a man's executor, until out of their profits the debts due from the testator be discharged, this interest in the lands is only a chattel interest, and on the death of such executor shall go to *his* executors (i): because they, being liable to pay the original testator's debts, so far as his assets will extend, are in reason entitled to possess that fund out of which he has directed them to be paid.]

(i) Co. Litt. 42 a.

CHAPTER VII.

OF ESTATES IN POSSESSION, REVERSION, AND REMAINDER.



HITHERTO we have considered estates solely with regard to their duration, or the *quantity of interest* which the owners may have therein. We are now to consider them with regard to the *time of their enjoyment*; and when contemplated in this light, they are either estates in possession or estates in expectancy. Where a man is entitled immediately to the possession, by virtue of any of the estates or interests which we have been considering, his estate is said to be in possession (*a*); when entitled to it, not immediately, but at some future time, his estate is said to be in expectancy. Of expectancies, again, there are, at the common law, two sorts; one called a *reversion*; the other a *remainder*.

I. Of estates in *possession* not much remains to be said. What has heretofore been stated has been stated of these estates, for in laying down general rules we assume that the estates are estates in possession. Nevertheless, it is material further to remark, that a man may have an estate in possession in land, and may yet not be in actual

(*a*) Blackstone (vol. ii. p. 163) defines estates in possession as “those whereby a present interest passes to and resides in the tenant, not depending on any subsequent circumstance or con-

tingency.” So it is said in 2 Cruise, Dig. 258, “that estates in possession are those where the tenant is entitled to the actual perpancy of the profits.”

possession of the land; for he may be *disseised* (*b*), that is, put out of the actual seisin, supposing his estate to be freehold; or may be deprived or ousted of the actual possession (whatever may be the nature of his estate), in some one of the wrongful ways which will hereafter be described when we come to treat of the various modes of civil injury (*c*); but, however ousted, he will still retain an estate in possession, according to the sense in which that term is above used. In such a case the true owner is also said to have the *right of possession* (*d*); as opposed to the mere *naked possession* of the wrongdoer: and this right of possession involves also the *right of entry*, that is, the right of entering upon and taking possession of the land withheld, if he can do so without breach of the peace, or the right to bring the action of ejectment; while, on the other hand, the naked possession of the wrongdoer is capable—by length of time and the neglect of the true owner to assert his right—of ripening, after a certain period (fixed, in general, at twelve years), into a lawful and indefeasible estate (*e*).

II. An estate in reversion is where any estate is derived, by grant or otherwise, out of a larger one, leaving in the original owner an ulterior estate immediately expectant on that which is so derived; the derivative estate is called the *particular estate* (as being only a small part or *particula* of the original one), and the ulterior interest is called the *reversion* (*f*). Thus, when the owner of the fee creates an

(*b*) Co. Litt. 181 a; Taylor v. Horde, 1 Burr. 60; Doe v. Perkins, 3 Mau. & Sel. 275.

(*c*) Vide post, bk. v. c. viii.

(*d*) Gilb. Ten. 21.

(*e*) 37 & 38 Vict. c. 57.

(*f*) Lord Coke says, "A reversion is where the residue of the estate always doth continue in

"him that made the particular estate, or where the particular estate is derived out of his estate, as in the case tenant in fee simple maketh gift in tail, &c." (Co. Litt. 22 b.) A reversion is defined by Blackstone (vol. ii. p. 175) as "the residue of an estate left in the grantor, to commence in pos-

estate in tail, for life, or for years, the residue of the fee simple which is undisposed of is the reversion expectant upon the particular estate in tail, for life, or for years, so created, and continues vested in him who was before the owner of the whole, *ipso facto* and without any special reservation for the purpose (*g*) ; for where a smaller estate is merely taken out of a larger, the residue remains, of course, in the original proprietor. This reversion is an actual interest or estate (*h*) ; but it is an estate in expectancy only, and not in possession, because the reversioner has no right to the possession until the particular estate is determined.

The tenant of a particular estate in tail, for life, or for years, holds of the reversioner, by fealty and by such services as are reserved between them. Hence the usual incidents to reversions are said to be fealty and rent ; rent being the usual description of service. [When no rent is reserved, fealty is reserved as an inseparable incident, and where rent also is reserved, it is also incident, though not inseparably so, to the reversion. The rent may be granted away, reserving the reversion ; and, by special words, the reversion may be granted away, reserving the rent ; but by a *general* grant of the reversion, the rent will pass with it as incident thereto, though by the grant of the rent generally, the reversion will not pass. The incident passes by the grant of the principal, but not *è converso* ; for the maxim of law is *accessorium non ducit sed sequitur suum principale* (*i*).]

Where a freehold reversion (that is, a reversion in fee, in tail, or for life) is expectant on a particular estate of freehold, the reversioner is said to be “seised of the reversion *as of fee*” (or, if his estate be for life, “*as of freehold*”) : and not to be “seised of the land *in his*

“ session after the determination
“ of some particular estate granted
“ out by him.”

(*g*) Litt. s. 19.

(*h*) Wiscot’s case, 2 Rep. 61 ; see
Doe v. Gatacre, 5 Bing. N. C.
619.

(*i*) Co. Litt. 151 b, 152 a.

demesne as of fee" (or "as of freehold"), as in the case of an estate in possession. But if a freehold reversion be expectant on a particular estate for years, it is in that case correct to describe the reversioner as "seised of the land *in his demesne* as of fee;" for his estate is considered (owing to the small regard paid to chattel interests) as amounting for many purposes to a freehold estate in possession, and the possession of the termor constitutes the seisin of the freeholder (*k*); and of a reversion expectant on a particular estate of freehold, no dower or curtesy can be claimed; but it is otherwise of a reversion expectant on a term of years (*l*).

By the principles of the *common law*, if the tenant of the particular estate for life or years made a conveyance by feoffment, for an estate not warranted by the nature of his interest; as where tenant for life made a feoffment in fee, or tenant for years a feoffment for life; it destroyed the particular estate, by converting it into a new and wrongful one; and by consequence it *displaced* or *divested* the reversion in expectancy thereon. And, on the other hand, it also operated as a *forfeiture* to the person in reversion, and gave him an immediate right to enter and take possession, in defeasance of the wrongful estate so created (*m*). The law, however, on these points is now to be understood as subject to the effect of the statute, 8 & 9 Vict. c. 106, by which it is provided (sect. 4), that "a feoffment made after 1st October, 1845, shall not have any tortious operation" (*n*)

(*k*) *Wrotesley v. Adams*, Plowd. 191; Co. Litt. 330 b, n. (1); *Doe v. Finch*, 4 B. & Adol. 305.

(*l*) Co. Litt. 29 b, 32 a; 2 Bl. Com. 127; *Stoughton v. Leigh*, 1 Taunt. 410.

(*m*) Litt. s. 415; Co. Litt. 251 a, b; *Chudleigh's case*, 1 Rep. 135 b; *Archer's case*, *ibid.* 66 b; *Doe v. Gatacre*, 5 Bing. N. C. 609.

(*n*) The Act 7 & 8 Vict. c. 76, which was repealed by the Act 8 & 9 Vict. c. 106, was in force from the 31st December, 1844, to the 1st October, 1845, and consequently still affects titles acquired by deed during that period; but it was an Act of which Mr. Justice Maule (in the case of *Stratton v. Pettitt*, 16 C. B. 432) remarked,

[Another doctrine, connected with the law of estates in reversion, is that of “merger.” It is a general principle of law, that where a greater estate and a less estate coincide in one and the same person, without any intermediate estate (*o*), the less estate is immediately annihilated or *merged*, that is sunk or drowned, in the greater. Thus, if there be a tenant for years, and the reversion in fee simple descends to or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more (*p*). But in order to this merger of estates, the estates must come to one and the same person, in one and the same right; for if the freehold be in his own right, and he has a term in right of another (*en autre droit*), there is no merger (*q*). Therefore, if tenant for years dies, and makes him who hath the reversion in fee his executor, whereby the term of years vests also in him, the term shall not merge: for he hath the fee in his own right, and the term of years in the right of the testator, subject to his debts and legacies. So, also, if he who hath the reversion in fee marries the tenant for years, there is no merger: for he hath (or had) the inheritance in his own right, the lease in the right of his wife (*r*). Moreover, an estate tail is an

“that it was incongruous and impossible of operation; and its absurdities were so great that the framers themselves had no very distinct notion of its meaning.”

(*o*) *Duncomb v. Duncomb*, 3 Lev. 437.

(*p*) By 8 & 9 Vict. c. 106, s. 9, when the reversion expectant on a lease (made either before or after the passing of that Act), shall, after the 1st October, 1845, be surrendered or merge, “the estate which shall for the time being confer, as against the tenant under the same lease, the next

“vested right to the same tenements or hereditaments, shall,—to the extent and for the purpose of preserving such incidents to, and obligations on, the same reversion, as, but for the surrender or merger thereof, would have subsisted—be deemed the reversion expectant on the same lease.”

(*q*) *Jones v. Davies*, 5 H. & N. 766.

(*r*) *Bracebridge v. Cook*, Plowd. 418; Co. Litt. 338 b; *Fearne's Cont. Rem.* 341, 9th edit.; 36 & 37 Vict. c. 66, s. 25.

[exception to the general law of merger; for a man may have, in his own right, both an estate tail and a reversion in fee; and the estate tail, though a less estate, shall not merge in the fee(s); for estates tail are protected and preserved from merger by the operation and construction, though not by the express words, of the statute *De donis*; which operation and construction have probably arisen upon this consideration, that in the common cases of merger of estates for life or years, by uniting with the inheritance, the particular tenant hath the sole interest in them, and hath full power at any time to defeat, destroy, or surrender them to him that hath the reversion; therefore, when such an estate unites with the reversion in fee, the law considers it in the light of a virtual surrender of the inferior estate (*t*); but in the case of an estate tail, the tenant for a long time had no power at all over it, so as to bar or to destroy it, and to this day cannot bar or destroy it except in a special method: it would therefore have been strangely improvident to have permitted the tenant in tail, by purchasing the reversion in fee, to merge his particular estate tail and defeat the inheritance of his issue; and hence it has become a maxim that a tenancy in tail, which cannot be surrendered, cannot be merged in the fee.]

Merger, it is to be observed, is not confined to cases where one of the coinciding estates is greater than the other in point of *quantity of interest*; for a term of years will merge in the immediate reversion, though that be a chattel interest also; and even where the term of years in reversion is of shorter duration than the term on which it is expectant, the merger will equally take place (*u*). So a fee simple conditional will merge in the possibility of reverter (*x*).

(s) *Wiscot's case*, 2 Rep. 61 a;
Lord Stafford's case, 8 Rep. 74 b.

(t) *Hughes v. Robotham*, Cro.
 Eliz. 302.

(u) *Bac. Abr. Leases, &c.* (S.) 2;
 3 *Prest. Conv.* 182; *Doe v. Walker*,
 5 *Barn. & Cress.* 111.

(x) *Simpson v. Simpson*, 4 *Bing.*
 N. C. 333.

III. An estate in *remainder* arises where after the creation of one estate out of a larger one an ulterior estate immediately expectant on that prior estate is at the same time and by the same conveyance also created out of the same larger estate; and in the case of such successive estates so created, the prior one is called the particular estate, and the ulterior one the remainder (*y*). [As if a man seised in fee simple granteth lands to A. for twenty years, and, after the determination of the said term, then to B. and his heirs for ever; here A. is tenant for years, remainder to B. in fee,—an estate for years being created or carved out of the fee, and given to A., and the residue or remainder being given to B.; both which interests are in fact only one estate, the term of years and the remainder, when added together, being equal only to one estate in fee (*z*), the prior estate being in possession, the ulterior in expectancy. So, if land be granted to A. for twenty years, and after the determination of the said term, to B. for life, and after the determination of B.'s estate for life, to C. and his heirs for ever: this makes A. tenant for years, with remainder to B. for life, remainder over to C. in fee. Now here the estate of inheritance undergoes a division into three portions; there is first A.'s estate for years carved out of it; and after that B.'s estate for life; and then the whole that remains is limited to C. and his heirs; and yet here also the first estate, and the two remainders are one estate only, being nothing but parts or portions of one entire inheritance; and if there were a hundred remainders, it would still be the same, for all the parts are equal, and no more than equal, to the whole. And therefore, no remainder can be

(*y*) Lord Coke defines a remainder as “a remnant of an estate in lands or tenements, expectant upon a particular estate created together with the same at one time,” (Co. Litt. 143 a): Blackstone, as

“an estate limited to take effect and be enjoyed after another estate is determined.” (2 Bl. Com. 164.)

(*z*) Co. Litt. 143 a; Fearn, by Butler, 308, 9th ed.

[limited after the grant of an estate in fee simple (a); because he that is tenant in fee hath in him the *whole* of the estate.] But until the whole fee simple is granted away, any quantity of interest may be carved out of it, expectant on the determination of some preceding interest. Therefore, a remainder, like an estate in possession, may be either in fee, in tail, for life, or years.

From what has been premised, it appears that a reversion and a remainder are both estates in expectancy, but differ in this respect, that the former remains in the grantor, by act or construction of law, as part of his former estate, but a remainder is an estate newly created by the act of the grantor. And here it is very material to remark, that it is *only* by way of remainder that, by the old *common law*, a man can create a new freehold estate in expectancy, in a corporeal hereditament; for by that law, a freehold in hereditaments corporeal cannot be created to commence *in futuro* (b)—that is, without the interposition of a particular estate on which it shall depend and be expectant. Thus if A., seised in fee of lands, convey them to B. to hold to him and his heirs, after the end of the three years next ensuing, in fee simple for ever, that is, by the common law, a void conveyance; and the reason of the rule is this, that no freehold can be created at common law, in a corporeal hereditament, without livery of seisin (c), a ceremony in its nature incompatible with any grant of the freehold *in futuro*; for livery imports a delivery of possession, and consequently supposes that a right to the immediate possession, and not merely to a future estate, is conveyed by the feoffor. And as it is the

(a) Colthirst v. Bejushin, Plowd. 29; Gardner v. Sheldon, Vaugh. 269.

(b) Barwick's case, 5 Rep. 94 b; 2 Bl. Com. 165.

(c) The reason here assigned for the rule that a freehold cannot commence *in futuro*, is that usually

given (Co. Litt. 217 a; Plowd. 156; Barwick's case, 5 Rep. 94 b; 2 Bl. Com. 165; Bac. Ab. Remainder (C)); but the rule has been based by others on the maxim that the freehold must never be in abeyance (Perrin v. Blake, Harg. Law Tracts).

necessity for this livery which constitutes the reason of the rule, so the rule itself extends not to mere chattel interests (*d*) : and accordingly, chattel interests are capable (even at common law) of being made to commence *in futuro* ; *e. g.*, a lease for seven years from next Michaelmas would be good. But when a particular estate is first created, a freehold *in remainder* can be readily limited thereon, for the livery of seisin is made to the particular tenant, and (when so made) enures also to the remainder-man, since his estate and that of the particular tenant are one and the same estate in law. [Thus a man may convey to A. in tail, remainder to B. in fee, and the same livery which conveys the estate tail to A. will also pass the remainder expectant thereon to B. The whole estate passes at once from the grantor to the grantees, and the remainder-man is seised of his remainder, at the same time that the particular tenant is seised of his estate tail (*e*).] And the case is the same where the particular estate is for years only ; *e. g.*, where one leases to A. for three years, with remainder to B. in fee, and makes livery to A. Here the livery indeed is not necessary for the lessee himself, because he has but a chattel : but it enures to the benefit of him in remainder, and the freehold is immediately created thereby and vested in B. during the continuance of A.'s term of years (*f*).

With respect to the creation of a remainder, the following rules may be laid down, which, though they amount to no more than an exposition of the different properties expressed in the very definition of this kind of estate, may yet serve to convey a more precise idea of its character :—

1. *There must be some particular estate precedent to the estate in remainder* (*g*). The necessity of this is sufficiently indicated by the term itself ; for remainder is a *relative* expression, and implies that some part of the

(*d*) 5 Rep. 94 ; Bl. Com. ubi sup.

(*e*) Co. Litt. 143 a.

(*f*) Co. Litt. 49 a, 49 b.

(*g*) Fearne, by Butler, p. 390, 9th edit.

thing is previously disposed of. [And as no remainder can be created without such a precedent particular estate, therefore the particular estate is said to *support* the remainder. But a lease at will is not held to be such a particular estate as will support a remainder (*h*); for an estate at will is of a nature so slender and precarious that it is not to be looked upon as a portion of the inheritance at all.]

2. *A remainder must commence or pass out of the grantor, at the time of the creation of the particular estate (i).* As where it is proposed to give to A. an estate for life, with remainder to B. in fee: here B.'s remainder in fee must pass from the grantor, at the same time with A.'s life estate in possession; for if the estate, ulterior to that for life, continues in the grantor, it is a reversion, and no remainder; and B. can take only by subsequent grant of this reversion.

3. *Remainders must be limited to take effect in possession immediately upon the determination of the particular estate, and neither later nor earlier (k).* Thus if A. be tenant for life, remainder to B. in tail, here B.'s remainder is to take effect in possession immediately upon A.'s death; or if A. and B. be tenants for their joint lives, remainder to the survivor in fee, here, on the death of either, the remainder comes into possession instantly; and therefore both these are good remainders. But if the future estate is to take effect in possession at any period *later* than the determination of the first, as if an estate be granted to A. during his life, and upon his death and one day after to B. and his heirs, this is no remainder (*l*). So the future estate will be no remainder, if it is not to *await* the proper

(*h*) Lord Stafford's case, 8 Rep. 75 a.

(*i*) 2 Bl. Com. 167; Plowd. 25; Litt. s. 721; Bac. Ab. Remainder (C).

(*k*) 1 Sand. Uses, 148, 2nd edit.; Chudleigh's case, 1 Rep. 135 a; Boraston's case, 3 Rep. 21 a; Co. Litt. 298 a.

(*l*) Colthirst v. Bejushin, Plowd. 25; Fearn, by Butler, 307, 9th ed.

and regular determination of the first, but to take effect in defeasance or abridgment of it; as where an estate is limited to A. for life, but if B. pays him a certain sum of money, then immediately to B. and his heirs (*m*). But though a remainder cannot be limited to take effect in possession until the particular estate regularly determines, yet eventually it may do so before that period. Thus if the particular estate determine by act of law (as by forfeiture) before its natural expiration, the remainder limited upon it will come into immediate possession, and is not required to wait until the expiration of the period originally assigned.

A remainder, when created, is subject to many of the rules already stated with regard to reversions. Thus, in the case of a freehold remainder, the remainder-man is seised as of fee (or as of freehold), but not “in his demesne;” unless the particular estate be a term of years, when seisin in demesne may be properly alleged. So *curtesy* or *dower* may be claimed of a remainder in fee, if expectant on an estate for years, but not if expectant on a freehold. Thus, too, the wrongful feoffment of the tenant for life or years, where the estate immediately expectant is not by way of reversion but remainder, had, at *common law*, the effect of displacing the remainder, and occasioning a forfeiture to the remainder-man, as in the other case to the reversioner; which tortious operation was for the future checked by the 8 & 9 Vict. c. 106, s. 4. Moreover, the union of an estate in remainder with the particular estate on which it is expectant, will produce a merger in the same cases (in general) and on the same principles, as if it were an estate in reversion (*n*).

Hitherto our remarks have related to remainders generally considered; but it is now time to turn our attention to the distinction which exists between remainders, as being either *vested* or *contingent*. *Vested* remainders, or

(*m*) 1 Sand. Uses, 143, 149; Sugd. p. 261, 9th ed.
Gilb. 152, n.; Fearn, by Butler,

(*n*) Bac. Leases, &c. (S) 2.

remainders executed, are where the estate is invariably fixed to remain to a determinate person after the particular estate is spent. As if A. be tenant for twenty years, remainder to B. in fee; here B.'s is a vested remainder. Contingent remainders (sometimes but very infrequently called also *executory* remainders) are those limited either to an uncertain person, or upon an uncertain event (*o*): that is, to a person not *in esse* or not ascertained (*p*); or upon an event which may not happen at all, or not happen till after the particular estate is determined (*q*). The first kind, or those limited to an uncertain person, may be exemplified by a limitation to A. for life, remainder to the first son of B., who has then no son born; for here the person is not *in esse*: or to A. and B. for their joint lives, remainder to the survivor in fee; for here the person is not ascertained. The second kind, or those limited on an uncertain event, may be exemplified by a lease to A. for life, remainder to B. for life, and if B. should die before A., then the remainder to C. for life; for B.'s dying before A. is an event that may never happen, and therefore the remainder to C. is contingent: or, as another instance, by a lease to A. for life, and after the death of B. the lands to remain to another in fee; for though it is certain that B. must die, his death may not happen until after A.'s life estate shall be determined. On the other hand, if there be no uncertainty either in the person or in the event, the mere uncertainty whether the remainder will ever take effect in possession, is not sufficient to give it the character of a contingent remainder; *e.g.*, in the case of a lease to A. for life, remainder to B. for life, the limitation of the remainder is to a person in being, and ascertained, and the event on which it is limited is certain, viz. the determination

(*o*) Mr. Fearne enumerates four different kinds of contingent remainders (Fearne, by Butler, p. 5, 9th ed.); but all the four may be

reduced to two, as in the text.

(*p*) Fearne, *ubi sup.* p. 9; Doe *d. Bills v. Hopkinson*, 5 Q. B. 228.

(*q*) Fearne, *ubi sup.*

of A.'s life estate: it is therefore a vested, and not a contingent, remainder (*r*): and yet it may possibly never take effect in possession; because B. may die before A. So, also, an estate limited to an existing and ascertained person (B.) upon the determination of an estate tail, is a vested and not a contingent remainder; for it is considered in law, that the estate tail, being a particular estate, is sure to come to an end, and that the failure of issue is consequently not a contingency, but a certain event. The case falls, therefore, within the definition of a vested remainder; the estate limited to B. being one that is invariably fixed to remain to a determinate person after the particular estate is spent.

No remainder, as we have already pointed out, can be limited after a fee simple; a contingent remainder may, however, be limited in *substitution* for another contingent remainder in fee simple; as if land be given to A. for life, and if he have a son, then to that son in fee; and if he have no son, then to B. in fee (*s*); and this has been sometimes called *a contingency with a double aspect* (*t*), and it is no violation of the rule above alluded to; for such remainders as these are *concurrent* and not *consecutive*; and though both are remainders on the particular estate, they are not remainders on each other (*u*).

(*r*) Doe *v.* Scudamore, 2 Bos. & Pul. 296.

(*s*) Loddington *v.* Kime, 1 Lord Raym. 208; Keene *v.* Dickson, 3 T. R. 495; Crump *v.* Norwood, 2 Marsh. 161.

(*t*) Loddington *v.* Kime, 1 Lord Raym. 208.

(*u*) Inasmuch as a contingent remainder in fee is a disposition (subject to the particular estate) of the *whole* inheritance, a question has been raised as to what becomes of the inheritance in the meantime. According to the older authorities,

it is in *abeyance*, or (according to Lord Coke) *caput inter nubila condit* (Co. Litt. 342 b; and see Year Book, 40 Edw. 3, 9); but according to Mr. Fearne, it continues in the grantor (Fearne, *ubi sup.* p. 350); and certainly where the contingent remainder in fee is created by a conveyance operating under the Statute of Uses (as to which hereafter), the fee remains in the grantor till the contingency happens; and where it is created by a will, the fee descends in the meantime to the heir-at-law.

It is laid down by Lord Coke, as to the nature of the contingency on which a remainder may be limited, that it must be *potentia propinqua*, which he also designates a *common possibility*; and that it must not be *potentia remota*, by which he means a possibility that cannot reasonably be expected to happen (*x*); and of this doctrine Blackstone (*y*) gives the following example, which is substantially the same with one adduced by Lord Coke himself, that is to say:—[A remainder to a man's eldest son, who hath none, is good, for by common possibility he may have one; but if it be limited in particular to his son John, it is bad if he have no son of that name, for it is too remote a possibility that he should have a son, and that such son should also have the particular name.] But the rule that a remainder cannot be limited upon a *potentia remota* (sometimes called a *double possibility* or a *possibility upon a possibility*) is no longer generally recognized (*z*); and as thus exemplified, at least, is not of a satisfactory character.

Contingent remainders are subject to the following two general rules:—

1. [*If they amount to a freehold, they cannot be limited on an estate for years, or any other particular estate less than a freehold.*—Thus, if land be granted to A. for ten years, with remainder in fee to the right heirs of B., this remainder is void; but if granted to A. for life, with a like remainder, it is good (*a*). For, unless the freehold passes out of the grantor at the time when the contingent remainder is created, such freehold remainder is void (*b*): it cannot pass out of him without vesting somewhere; and in the case of a contingent remainder, the freehold must vest in the particular tenant, else it can vest nowhere: unless, therefore, the estate of such particular tenant be

(*x*) Cholmley's case, 2 Rep. 51; 1, 32.
Co. Litt. 378.

(*y*) 2 Bl. Com. p. 170.

(*z*) Cole v. Sewell, 4 Dru. & War.

(*a*) Chudleigh's case, 1 Rep. 130 a.

(*b*) Fearn, ubi sup. p. 281.

[of a freehold nature, the freehold cannot vest in him, and consequently the remainder is void.]

2. *Every contingent remainder must become vested either during the continuance of the particular estate, or eo instanti that it determines (c).*—When the contingent person comes into being or is ascertained during the continuance of the particular estate, or the contingent event takes place during that period, the remainder ceases to be a contingent, and becomes a vested one. Thus if A. be tenant for life, with remainder to B.'s eldest son, then unborn, in tail; the instant that a son is born during the continuance of the particular estate, the remainder is no longer contingent, but vested (*d*). On the other hand, although the person comes not into being, or is not ascertained, or the event does not happen during the continuance of the particular estate, yet if such person or event comes into being, or is ascertained, or happens, although at the last moment (*i.e.*, immediately on the determination of the particular estate), the remainder then of course takes effect as an estate in possession; or, in other words, vests in possession. Thus, if land be given to A. and B. during their joint lives, remainder to the survivor in fee; this remainder, immediately on the death of either, becomes vested in possession in the survivor.

From this the important doctrine followed, that so long as a remainder was in contingency, it always required the continuing support of the particular freehold estate (*e*);

(*c*) Archer's case, 1 Rep. 66 b; Co. Litt. 298 (a); Bac. Ab. Remainder (D.); 2 Saund. by Wms. 387, n. (7); 2 Bl. Com. 168, in which last work the rule is laid down, as to remainders *generally*, thus: "that the remainder must vest in the grantee during the continuance of the particular estate, or *eo instanti* that it determines;" and this is the form in which it is often ex-

pressed; but where a remainder is not originally contingent, it is necessarily vested from the time of its creation, and cannot be said properly to vest during the continuance of the particular estate, and still less upon its determination.

(*d*) 2 Bl. Com. 169.

(*e*) Colthirst v. Bejushin, Plowd. 25.

so that if that estate came by any means to an end before the contingency happened, the remainder was altogether *defeated* (*f*); for before the happening of the contingency, there was no person entitled to take the remainder or in whom it could vest; and by the rule under consideration, it could no longer exist as a contingent remainder, because the particular estate was determined. Thus if A were tenant for life, with remainder to B's eldest son, then unborn, in tail; if A. died before the contingency happened, that is, before B. had a son, the remainder was absolutely gone: for the particular estate was determined before the remainder could vest (*g*). Nay in one case (*h*), where A., tenant for life under a will, with remainder to his own eldest son in tail, died without issue born, but leaving his wife *enccinte* or big with child, and after his death a posthumous son was born, it was held that by the strict rule of law this son could not take the land by virtue of the remainder: for the particular estate had determined before there was any person actually in existence in whom the remainder could vest. This decision, however, was ultimately reversed in the House of Lords; and the law on this subject now depends on that judgment (which referred to the case of estates devised by will) and on a statute subsequently passed (10 & 11 Will. III. c. 16), which enacts that posthumous children shall be capable of taking in remainder, in the same manner as if they had been born in their father's lifetime; that is, the remainder is allowed to vest in them while yet in their mother's womb (*i*).

The remainder was defeated by the determination of

(*f*) *Purefoy v. Rogers*, 2 Saund. 386, 387; 2 Bl. Com. 171.

(*g*) 2 Bl. Com. 169.

(*h*) *Reeve v. Long*, 1 Salk. 228; 4 Mod. 282.

(*i*) Where a posthumous child takes by way of *remainder*, he is entitled to the intermediate pro-

perty from the death of the parent; though where a posthumous child takes by *descent*, divesting the estate of the supposed heir, he takes only from the time of his birth. (*Thellusson v. Woodford*, 11 Ves. 139; *Goodtitle v. Newman*, 3 Wils. 526.)

the particular freehold estate before the contingency happened, even though that estate determined prematurely, as by the voluntary act of the particular tenant himself (*k*). Thus, a tenant for life, with remainder to his unborn son in tail, remainder over to a stranger in fee, might, before a son was born, have destroyed the life estate by a wrongful feoffment in fee, or by a surrender of it to the person in ultimate remainder, so as to merge it in the fee: and in either case the contingent remainder to the son would have been defeated (*l*). [In these cases, therefore, it was necessary to have trustees appointed to preserve the contingent remainders, in whom there was vested an estate in remainder for the natural life of the tenant for life, to commence when his estate determined (*m*): and then, if his estate for life determined otherwise than by his death, for example, by wrongful alienation, or by surrender, the estate of the trustees for the residue of his natural life would take effect as a particular estate in possession, sufficient to support the remainder, or successive remainders, depending in contingency, a method said to have been invented by Sir Orlando Bridgman, Sir Geoffrey Palmer, and another eminent counsel, in order thereby to secure in family settlements a provision for the future children of an intended marriage; and when, after the Restoration, those gentlemen came to fill the first offices of the law, they supported this invention within reasonable and proper bounds, and introduced it into general use.]

When land was settled in the form here supposed, that is, by a limitation to the parent for life, and after his death to his first and other sons or children, in tail, and trustees were interposed to preserve the contingent remainders, this was called a *strict settlement*. The estate tail immediately expectant on the parent's life estate, was

(*k*) Chudleigh's case, 1 Rep. 386, 387.

135 b; Archer's case, *ibid.* 66 b.

(*m*) Parkhurst v. Smith, Willes,

(*l*) Purefoy v. Rogers, 2 Saund. 338; 3 Atk. 138.

not only exempt from the danger of being defeated before the first son was born, but remained unalienable until he attained the age of twenty-one; at that period, however, he might, with the concurrence of his parent, if then living, or at his own pleasure, if his parent were dead, bar both his own issue and those in remainder or reversion, and convert his estate tail into a fee simple absolute; and, even without the concurrence of his parent, might in all cases bar his own issue, leaving the ulterior estates undisturbed. This state of the law as regards the position of a child to whom, before his birth, a remainder in tail has been limited, expectant on a precedent life estate limited to his parent, is still unaltered, though by the effect of a late statute, which we shall presently mention, the interposition of trustees to preserve contingent remainders is no longer necessary to his security.

However, to support a contingent remainder, it was not, even at the common law, essential that the particular estate should be in actual possession; for, provided such an estate were in existence, it would suffice for that purpose, though it were reduced to a *right of entry* (*n*). Thus, if there were an estate for life, with a contingent remainder over, and the tenant for life were disseised, that is, put out of his seisin or possession of the freehold by a stranger, the right of entry in the disseisee would have been sufficient to support the remainder (*o*).

The law was said to lean against contingent remainders, as compared with vested ones, on account of the liability of the former to be defeated; and therefore in a case of doubtful interpretation, a remainder would be construed as vested, rather than as contingent (*p*). But the liability of contingent remainders to destruction has recently been materially altered: for, 1stly, by the statute 8 & 9 Vict. c. 106, s. 8, “a contingent remainder existing at any time

(*n*) Archer's case, 1 Rep. 66 b,
67 a.

(*p*) Doe *d.* Pilkington *v.* Spratt,
5 Barn. & Adol. 731.

(*o*) Ibid.

a reversion). which does not take effect until the death of the tenant for life. Executory interests, under a limitation created by will is termed an executory devise.

CH. VII.—OF ESTATES IN POSSESSION, REVERSION, ETC. 323

“after the 31st day of December, 1844, shall be,—and if
“created before the passing of that Act, shall be deemed
“to have been,—capable of taking effect, notwithstanding
“the determination by *forfeiture, surrender, or merger*, of
“any preceding estate of freehold, in the same manner, in
“all respects, as if such determination had not happened”;
and 2ndly, by the statute 40 & 41 Vict. c. 33, which
passed on the 2nd August, 1877, every such remainder
created by any instrument (including a will) executed
after that date, which would have been valid as a spring-
ing or shifting use, or executory devise, or other executory
limitation, had it not had a sufficient estate to support it
as a contingent remainder, shall,—in the event of the
particular estate determining before the contingent re-
mainder vests,—be capable of taking effect in all respects
as if the contingent remainder had originally been created
as a springing or shifting use, or executory devise, or other
executory limitation.

Note that the
first of these does
not apply for the
case of the regu-
lar determination
of the particular
estate by the
completion of the
period for which
it was limited to
the vesting of the
contingent remainder.

In connection with the subject of remainders, that remarkable rule of construction commonly called the *Rule in Shelley's case* (q), demands our consideration. The rule is propounded in Lord Coke's Reports in the following form: that wherever a man by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his *heirs* in fee or in tail, the word *heirs* is a word of *limitation*, and not of *purchase* (r); in other words, it is to be understood as expressing the quantity of estate which the party is to take, and not as conferring any distinct estate on the persons who may become his

(q) Fearn, by Butler, 28—208,
9th ed.; Bradley v. Cartwright,
Law Rep., 2 C. P. 511; Cooper v.

Kynock, Law Rep., 7 Ch. App.
398.

(r) Shelley's case, 1 Rep. 104 a;
Curtis v. Price, 12 Ves. 89.

representatives. And here let it be observed, that this is the *ordinary* force of the word *heirs*; for if land is given to a man and his heirs, he takes a fee simple; if to him and the heirs of his body, a fee tail; in which cases, the word "*heirs*" plainly operates as a mere limitation of the quantity of his estate. But where land is given to A. for his life, and on his decease to his heirs, or to the heirs of his body; it might be supposed, from the doctrines we have been considering with respect to remainders, that this confers a separate estate on his representatives; and that he will take for his own life only, with contingent remainder to his heirs, or to the heirs of his body, according to the apparent purport of the grant. And such ulterior limitation would in fact be a contingent remainder to them, if the previous life estate had been limited not to A. himself, but to another person. By the effect, however, of the *Rule in Shelley's case*, the heirs, or heirs of the body, of A. will not take in remainder, (in the case supposed,) nor will A. himself take a mere life estate, but a remainder also, in fee or tail; and as that remainder will absorb, according to the law of merger, his life interest, the result upon the whole conveyance will be to give A. an *estate in fee* (or in *tail*, as the case may be) *in possession*. And upon the same principle, if another particular estate, by way of vested remainder upon A.'s life estate (for example, a life estate to B.), be interposed before the ulterior limitation to A.'s heirs, or the heirs of A.'s body, that ulterior limitation will take effect in A. himself; but as a vested remainder only in fee or tail, because the intervening estate in B. will in that case prevent a merger. If the estate interposed, indeed, be not a vested but a contingent remainder, A. will take (as in the case first supposed) the entire fee; for while the contingency is in suspense, there is nothing to prevent the consolidation of his life estate with the ulterior limitation to his heirs; yet he takes it *sub modo* only, that is to say, it will (either under the stat. 8 & 9 Vict. c. 106, or under the stat. 40 & 41

Vict. c. 33,) open and let in the intermediate estate, if and when the contingency happens (*s*).

With respect to the *reason* of the *Rule in Shelley's case*, it is involved in much obscurity (*t*); but according to the prevalent opinion, it was established with a view to the protection of the feudal lord, who would have been defrauded, it is said, of his wardship and other perquisites, if the heir had been allowed to take by way of remainder, and not by hereditary succession. And the argument by which it is best supported seems to be in substance as follows: that where by the same conveyance land is given to a person for his life, and afterwards to the heirs of the same person, it is reasonable to presume that he is himself intended in both cases as the sole object of the gift; and that no benefit is designed to his heirs, except what they may derive by operation of law from his own antecedent seisin.

We shall conclude this chapter with some notice of two legislative provisions,—one intended for the protection of those who are possessed of *reversionary interests*, the other to ascertain the rule which is to govern the disposal by sale of such interests, whether in real or in personal estate.

1. [By 6 Anne, c. 18 (*u*), in order to assist such persons as have any estate in remainder, reversion, or expectancy after the death of others, against fraudulent concealment of their deaths, it is enacted that all persons on whose lives any lands or tenements are holden shall (upon application to the court and order made thereupon) once in every year, if required, be produced to the court or its commissioners; or, upon neglect or refusal, they shall be taken to be actually dead, and the person entitled to such expectant estate may enter upon and hold the lands and tenements till the party shall appear to be

(*s*) Fearne, by Butler, p. 29;
Lewis Bowles's case, 11 Rep. 79 b.

(*t*) Hist. Eng. Law, by Reeves,
vol. iii. p. 8.

(*u*) In Revised Statutes, c. 72.

[living (*v*).] 2. By 31 Viet. c. 4, it has been provided that no purchase of any reversionary interest, made *bonâ fide* and without fraud or unfair dealing, shall hereafter be set aside merely on the ground of *under-value*—a circumstance which, as the law was previously administered in the courts of equity, was in some cases held to vacate the transaction (*x*).

(*v*) *Re Isaac*, 4 Myl. & Cr. 11; 641; *Tyler v. Yates*, L. R., 6 Ch. 665; *Nevill v. Snelling*, 15 App. 665; *Re Lingen*, 12 Sim. 104; *Re Thomas Stevens*, 31 Ch. Div. 320. Ch. Div. 679; *Fry v. Lane*, 40 Ch. Div. 312; and *Whittet v. Bush*, *ib.*

(*x*) *Miller v. Cook*, L. R., 10 Eq.

CHAPTER VIII.

OF ESTATES IN SEVERALTY, JOINT-TENANCY, COPARCENARY, AND COMMON.



[WE come now to treat of estates, with respect to the number and connection of their owners ; and, considered in this view, estates of any quantity or length of duration, and whether they be in actual possession or in expectancy, may be held in four different ways ; in severalty, in joint-tenancy, in coparcenary, and in common.

I. He that holds lands or tenements in *severalty*, or as sole tenant thereof, is he that holds them in his own right only, without any other person being joined or connected with him in point of interest during his estate therein. This is the most common and usual way of holding an estate : and therefore we may make the same observations here that we did upon estates in possession, as contradistinguished from those in expectancy, in the preceding chapter : that there is little or nothing peculiar to be remarked concerning them, since all estates are supposed to be of this sort, unless the contrary is expressed ; and in laying down general rules and doctrines, we usually apply them to such estates as are held in severalty. We shall therefore proceed to consider the other three species of estates, in which there is always a plurality of tenants.]

All the three last-mentioned species of estate have this common characteristic,—that the tenants hold *pro indi-*

viso (a) ; one person is not seised or possessed exclusively of one acre, and another person of another (for then they would be tenants in severalty) ; but the interest and possession of each extend to every specific portion of the whole land of which they are joint-tenants, coparceners, or tenants in common ; and accordingly, though only one of them should happen to be in actual possession, yet his possession is considered for many purposes as that of all (b). But in many points of view these different species of estate are materially distinguishable from each other in their character and properties, and it will be necessary, therefore, to consider them separately and in succession.

II. An estate then in *joint-tenancy* is where an estate is acquired by two or more persons in the same land, by the same title (not being a title by descent), and at the same period, and without any limitation by words importing that they are to take in distinct shares (c). Thus, if there be a conveyance of lands to A. and B., without more, this makes them joint-tenants of the freehold ; if to A. and B. and their heirs, this makes them joint-tenants of the fee. [The estate so acquired is called an estate in joint-tenancy (d), and sometimes an estate in *jointure*, which word, as well as the other, signifies an union or conjunction of interest ; though in common speech the term *jointure* is usually confined to that estate, which, by virtue of the statute 27 Hen. VIII. c. 10, is sometimes vested in the husband and wife before marriage, as a full satisfaction and bar of dower.

This estate of joint-tenancy has several conditions and properties, which require to be distinctly pointed out before a just conception of its nature can be attained.

(a) Co. Litt. 189 a, 190 b, 163 a.

Doe v. Pearson, 6 East, 173.

(b) See Doe v. Taylor, 5 Barn. & Adol. 583 ; Ford v. Grey, 1 Salk.

(c) Co. Litt. 180 a—188 b.

285 ; Doe v. Keen, 7 T. R. 386 ;

(d) Litt. s. 277.

[And 1. Among joint-tenants there is a *unity of title* (*e*), that is, their estate must be created by one and the same act, whether legal or illegal,—as by one and the same grant, or by one and the same disseisin (*f*).] 2. The estate of joint-tenants *vests in them, in general, at one and the same period* (*g*). Thus, if an estate be granted to J. S. for life, with remainder to A. and the eldest son of B. (B. having no son at the time), and their heirs, A. does not take in joint-tenancy with B's eldest son, because A. takes a vested remainder in a moiety immediately on the execution of the conveyance, while the remainder in the other moiety does not vest until a son is born to B.; nor (formerly) at all if J. S. dies first. And even if a son is born to B. in J. S.'s lifetime, still A. had, up to that period, no joint interest with him; and the tenancy, not being *ab initio* a joint tenancy, cannot become so afterwards. On the other hand, in a case of remainder to A. and B. and their heirs, after a previous life estate, they take in joint-tenancy, because they both take at once a vested remainder. 3. Among joint-tenants there is also a *similarity of interest* as regards the quantity of estate. One joint-tenant cannot be entitled to one period of duration or quantity of interest in lands, and the other to a different; one cannot be tenant for life and the other for years; one cannot be tenant in fee, and the other in tail (*h*). Yet there may be joint-tenants as to a portion of the fee, with a several interest in one or more of them as to the residue. Thus, if land be granted to A. and B. for their lives, and to the heirs of A.; here A. and B. are joint tenants of the freehold during their joint lives, and A. has a several inheritance in fee simple; or if land be given to A. and B., and the heirs of the body of A.; here both have a joint estate for life, and A. has a several inheritance in tail (*i*). 4. There is an *entirety and equality of interest*

(*e*) 2 Bl. Com. 181.

188 a.

(*f*) Litt. s. 278.(*h*) Co. Litt. ubi sup.(*g*) Bl. Com. ubi sup.; Co. Litt.(*i*) Litt. s. 285. Blackstone's

among the tenants; for while they continue to hold together, they are not considered as holding in distinct shares, but each is equally entitled to the *whole*. And, on the other hand, though the entirety ceases for the purpose of alienation, every co-tenant being entitled (if he thinks proper) separately to transfer his own share, yet the equality remains; for each is capable of conveying an equal share with the rest.

This combination of entirety of interest with the power of transferring in equal shares, is expressed by the antient law maxim, that every joint-tenant is seised *per my et per tout* (*k*). And this is considered as an essential characteristic of a joint estate; and therefore if an estate in fee were given to a man and his wife, they were not properly joint-tenants, but were tenants by *entireties*; for husband and wife being considered as one person in law, they could not take the estate by moieties, but both were seised of the entirety, *per tout et non per my*; the consequence of which was, that neither the husband nor the wife could dispose of any part without the assent of the other, but the whole

expression (vol. ii. p. 181) is, that "A. has the *remainder* in severalty" in these cases. But Littleton says, "one hath a freehold and the other a fee-simple," and Lord Coke says, that "they are joint-tenants for life, and the fee-simple or estate tail is in one of them;" and, in such a case, though a joint-tenancy for life subsists with all the usual incidents, yet the estate of the joint-tenant, who has the fee, is for many purposes (particularly that of alienation) an entire inheritance, not broken into a particular estate and remainder thereon. (Wiscot's case, 2 Rep. 60 b; Forrest v. Whiteway, 3 Exch. 367.)

(*k*) Blackstone (vol. ii. p. 182) gives, as the meaning of this expression, that each has "the entire possession, as well of every parcel as of the whole," and in this he follows the words of Littleton, s. 288; but in commenting on the words, *per my et per tout*, Lord Coke (citing Bracton) remarks, "*Et sic totum tenet, et nihil tenet scil. totum conjunctim et nihil per se separatim*"; and albeit they are so "seised, as for example, where there be two joint-tenants in fee, yet to divers purposes each of them hath but a right to a moiety, as to enfeof, give, or demise, or to forfeit, &c." (Co. Litt. 186 a.) See also Murray v. Hall, 7 C. B. 455, n. (*a*).

remained to the survivor (*l*). And so if a joint estate in land was conveyed to a husband and wife, and to a third person, the husband and wife took a moiety, and the third person the other moiety, in the same manner as if the grant had been to only two persons (*m*). It was at one time supposed to result from the Married Women's Property Act, 1882 (*n*), that as regards property the title to which is conferred by a deed or will executed after the 31st December, 1882, husband and wife were no longer to be considered as one person in law, but as two distinct persons (*o*); consequently, that husband and wife would in the cases supposed be joint-tenants simply and not tenants by entireties, and that each would take an equal share, not only as between themselves, but also *quoad* any third party made a co-tenant with them; but it has been latterly determined that that is not the result of that Act, but that, *quoad* the third party, husband and wife are still one person in law, and therefore take a moiety only, but as between themselves, they no longer hold by entireties, but each becomes the tenant of an undivided fourth part (*p*). Yet even under the old law, if a grant were made to husband and wife expressly to hold as tenants in common, they would have held accordingly (*q*); and that result may still be accomplished by a proper expression of the intention of the grantor in that behalf.

[From the entirety of interest in each of the co-tenants results the incident or consequence of *survivorship*. For when two or more persons are seised of a joint estate of freehold, or are jointly possessed of any chattel interest in lands, the entire tenancy, upon the decease of any of them, remains to the survivors, and at length to the last

(*l*) Litt. s. 665; Co. Litt. 187 b;
Bro. Abr. t. *cui in vitâ*, 8; Beaumont's case, 9 Rep. 138; Doe v. Parratt, 5 T. R. 652.

(*m*) Litt. s. 291.

(*n*) 45 & 46 Vict. c. 75.

(*o*) Mander v. Harris, 24 Ch. Div. 222; 27 Ch. Div. 166.

(*p*) Jupp v. Buckwell, 39 Ch. Div. 148.

(*q*) Co. Litt. 187 b.

[survivor; and he shall be entitled to the whole estate (*r*). One has not a distinct moiety from the other, but while the joint-tenancy continues each joint-tenant has a concurrent interest in the whole; and therefore it is that on the death of his companion, the sole interest in the whole remains to the survivor. For the interest which the survivor originally had, is clearly not divested by the death of his companion; and no other person can now claim to have a *joint* estate with him, *scil.*, an interest in the whole, accruing by the same title; nor yet a *separate* interest in any part of the tenements; and as no one can now be admitted, either jointly or severally, to any share with him therein, it follows that his own interest is entire and several, and to the whole estate.]

The right of survivorship is called by our antient authors the *jus accrescendi*, because the right, upon the death of one joint-tenant, accumulates and increases to the survivors; or, as they themselves express it, "*pars illa communis accrescit superstitibus, de personâ in personam, usque ad ultimam superstitem*" (*s*). And the rule is that *jus accrescendi præfertur oneribus* (*t*); so that no dower or curtesy can be claimed out of a joint estate. Indeed, even where one of the joint-tenants aliened his share (which discharged it from any claim of his co-tenant in respect of survivorship), yet the wife of the alienor was not (even under the old law) entitled to her dower (*u*); for the land never was in his seisin, except as subject to the paramount claim of the survivor; and therefore there was no such sole seisin as that the dower could arise out of it.

An estate in joint-tenancy may be dissolved or destroyed:—1. *By partition*. Thus, if two joint-tenants agree to part their lands, and to hold them in severalty, the effect thereof is to make them no longer joint-tenants, for they no longer hold *pro indiviso*; and the right of

(*r*) Litt. ss. 280, 281.

(*t*) Co. Litt. 185.

(*s*) Bracton, l. 4, tr. 3, c. 9, s. 3;
Fleta, l. 3, c. 4, s. 2.

(*u*) Co. Litt. 31 b, and n. 4, by
Harg.

survivorship, also, is by such separation destroyed (*x*). But with regard to such a transaction, the 8 & 9 Vict. c. 106, s. 3, provides that a partition of any tenements or hereditaments (not being copyhold) made after the 1st October, 1845, shall be void at law unless made by *deed*. By the common law all the joint-tenants might agree to make partition of the lands, but one of them could not compel the other so to do (*y*); for this being an estate originally created by the act and agreement of the parties, the law would not permit any one or more of them to destroy the united possession without the consent of the others. But by the statutes 31 Hen. VIII. c. 1, and 32 Hen. VIII. c. 32, joint-tenants were, in case of refusal by any of them, made compellable by *writ of partition* to divide their lands; and though this writ, together with the other antient forms of real action, was abolished by 3 & 4 Will. IV. c. 27, s. 36, joint-tenants are still compellable by action to make partition, *scil.*, by proceedings in *equity*, praying or claiming that relief (*z*); and in such action, the property may be (and very commonly is) disentailed, sold, and the proceeds divided (*a*). 2. [*The jointure may be destroyed by alienation without partition.* As if one joint-tenant alienes and conveys (or even sells and agrees to convey) his estate to a third person; here the joint-tenancy is severed, and turned into a tenancy in common; for the grantee and the remaining joint-tenant hold by different titles,—one derived from the original, the other from the subsequent, grantor; though, till partition made, the undivided tenancy continues (*b*). And so if one of two joint-tenants releases his share to the other, the joint-tenancy is dissolved, and turned to an estate in seve-

(*x*) Co. Litt. 188 a, 193 a.

(*y*) Litt. s. 290.

(*z*) Co. Litt. by Harg. 169 a, n. (2); 1 Fonbl. Tr. Eq. 18; Landell v. Baker, Law Rep., 6 Eq. Ca. 268; Drinkwater v. Ratcliffe, ib. 20 Eq. Ca. 528; Burnell v.

Burnell, 11 Ch. D. 213; Richardson v. Feary, 39 Ch. Div. 45.

(*a*) 31 & 32 Vict. c. 40 (the Partition Act, 1868); 39 & 40 Vict. c. 17.

(*b*) Litt. s. 292; Smith v. Sibthorpe, 1894, 1 Ch. 362.

[ralty (c). But a devise of one's share by will is no severance of the jointure, the *jus accrescendi* being preferred *ultima voluntati* (d); for no testament takes effect till after the death of the testator; and by such death the right of the survivor, which accrued at the original creation of the estate, and has therefore a priority to the other, is already vested (e). 3. *The jointure may also be destroyed by an accession of interest.* Thus, if there be two joint-tenants for life, and the inheritance is purchased by or descends upon either, it is a severance of the jointure, for such event renders their interests dissimilar as regards the quantity of estate (f); though, if an estate is originally limited to two for life, and after to the heirs of one of them, the freehold shall remain in jointure, without merging in the inheritance; because being created by one and the same conveyance, they are not separate estates but branches of one entire estate (g).

It is proper to add, that whenever or by whatever means the jointure ceases or is severed, the right of survivorship or *jus accrescendi* the same instant ceases with it (h). Yet, if one of three joint-tenants alienes his share, the two remaining tenants, as between themselves, still hold their parts by joint-tenancy and survivorship (i); and if one of three joint-tenants releases his share to one of his companions, though the joint-tenancy is destroyed with regard to that part, yet the two remaining parts are still *inter se* held in jointure (k).

In general it is advantageous for the joint-tenants to dissolve the jointure; since thereby the right of survivorship is taken away, and each may transmit his own part to

(c) *Avery v. Cheslyn*, 3 Ad. & El. 75.

(d) Co. Litt. 185 b; *Swift v. Roberts*, Ambl. 617.

(e) Litt. s. 287; 3 Burr. 1488; Co. Litt. ubi sup.

(f) Cro. Eliz. 470.

(g) *Wiscot's case*, 2 Rep. 60; Co. Litt. 182 b.

(h) "*Nihil de re accrescit ei, qui nihil in re quando jus accresceret habet.*"—Co. Litt. 188 a.

(i) Litt. s. 294.

(k) Ib. s. 304.

[his own heirs. Sometimes, however, it is disadvantageous to dissolve the joint estate: as if there be two joint-tenants for life, and they make partition, this dissolves the jointure; and, though before they each of them had an estate in the whole for his own life, and the one of them for the life of his companion also, now each has an estate in a moiety only, for his own life merely; and on the death of either, the reversioner shall enter on his moiety (*l*).

III. An estate held in *coparcenary* is where lands of inheritance descend from the ancestor to two or more persons (*m*). It arises either by common law or by particular custom. By common law: as where a person seised in fee simple or in fee tail dies, and his next heirs are two or more females, his daughters, sisters, aunts, female cousins, or their representatives; in this case they shall all inherit, as will be more fully shown when we treat of descents hereafter; and these co-heirs are then called *coparceners*, or for brevity, *parceners* only (*n*); though in some points of view the law considers them as together making only one heir (*o*). Parceners by particular custom are where lands descend, as in gavelkind, to all the *males* in equal degree, as sons, brothers, uncles, &c. (*p*).]

An estate in coparcenary resembles, in some respects, that in joint-tenancy, there being the same unity of title and similarity of interest. But in the following respects they materially differ:—1. Parceners always claim by *descent*, whereas joint-tenants always claim by *the act of parties*. Therefore, if two sisters purchase lands, to hold to them and their heirs, they are not parceners, but joint-tenants (*q*); and hence it likewise follows, that no lands can be held in coparcenary but estates of inheritance, which are of a descendible nature; whereas not only estates in

(*l*) 1 Jones, 55; Co. Litt. 191 a.

(*m*) Co. Litt. 163 a—180 a.

(*n*) Litt. ss. 241, 242.

(*o*) Co. Litt. 163 b, 164 a; Vin.

Ab. Parceners (Q); R. v. Bonsall, 3 B. & C. 173.

(*p*) Litt. s. 265.

(*q*) Ib. s. 254.

fee and in tail, but for life or years, may be held in joint-tenancy. 2. There is no *entirety of interest* among coparceners. They are properly entitled each to a distinct share (*r*), and of course there is no *jus accrescendi* or survivorship between them, for each part descends severally to their respective heirs, though the undivided tenancy continues. And as long as the lands continue in a course of descent, and are held *pro indiviso*, so long are the tenants therein, whether male or female, called parceners. 3. Though the interest of coparceners accrue by the same title, yet *they may accrue at different periods*. For if a man hath two daughters, to whom his estate descends in coparcenary, and one dies before the other, the surviving daughter and the heir of the other, or when both are dead, their two heirs, are still parceners (*s*); the estates vesting in each of them at different times, though it be the same quantity of interest, and held by the same title. 4. And lastly, though persons related in equal degree to the ancestor are entitled in equal shares, yet as their heirs will represent them, or stand in their place, there is no necessary *equality of interest* among parceners. Thus, if a man die leaving four grand-daughters, three of them the issue of an elder daughter, and one of a younger, all four shall inherit; but the daughter of the younger shall take as much as all the other three (*t*).

[With respect to an estate in coparcenary, the following rule deserves notice: that if one of two or more sisters, to whom lands descended in coparcenary, held an estate which had been given to her in *frankmarriage* by the same ancestor from whom the lands thus descended to her, she could not take her share of them without first adding to them her estate in *frankmarriage*, in order that the whole property might be equally divided between all the sisters (*u*). This mode of division was known in the law

(*r*) Co. Litt. 163, 164.

(*s*) Ib. 164, 174.

(*t*) Ib. 164 b.

(*u*) Bracton, l. 2, c. 34; Litt. ss. 266—273.

[of the Lombards, which directs the woman so preferred in marriage and claiming her share of the inheritance, “*mittere in confusum cum sororibus, quantum pater aut frater ei dederit, quando ambulaverit ad maritum*” (x). With us it is denominated bringing those lands into *hotchpot* (y); which term shall be explained in the very words of Littleton (z): It seemeth that this word, *hotch-pot*, is in English a pudding; for in a pudding is not “commonly put one thing alone, but one thing with other “things together.” By this housewifely metaphor our ancestors meant to inform us that the lands, both those given in frankmarriage and those descending in fee simple, should be mixed and blended together, and then divided in equal portions among all the daughters (a). But this was left to the choice of the donee in frankmarriage; and if she did not choose to put her lands into *hotchpot* she was presumed to be sufficiently provided for, and the rest of the inheritance was divided among her sisters. The law of *hotchpot* took place, then, only when the other lands descending from the ancestor were fee simple; for if they descended in tail, the donee in frankmarriage was entitled to her share, without bringing her lands so given into *hotchpot* (b). And the reason is, because lands descending in fee simple are distributed by the policy of the law, for the maintenance of all the daughters; and if one has a sufficient provision out of the same inheritance equal to the rest, it is not reasonable that she should have more; but lands descending in tail are not distributed by the operation of the law, but by the designation of the donor, *i. e.*, *per formam doni*; it matters not, therefore, how unequal this distribution may be. Also, no lands but such as are given in frankmarriage shall be brought into *hotchpot*; for no others are looked upon in law as given for the advancement of the woman, or by way of marriage por-

(x) L. 2, t. 14, c. 15.

(y) Britton, c. 72.

(z) Litt. s. 267.

(a) Litt. s. 268.

(b) Ib. s. 274.

[tion (*c*). And, therefore, as gifts in frankmarriage are fallen into disuse, the law of hotchpot would hardly have been worth notice, had not this method of division been revived and copied by the statutes “for the distribution of the personal estates of intestates,” which we shall hereafter consider at large.

The modes of dissolving an estate in coparcenary are as follows:—(1.) *By partition*. Parceners are so called, saith Littleton, because they may be constrained to make “partition” (*d*); and he mentions many methods of making it, four of which are by consent and one by compulsion (*e*). The first is, where they agree to divide the lands into equal parts in severalty, and that each shall have such a determinate part. The second method is, when they agree to choose some friend to make partition for them, and then the sisters shall choose each of them her part according to seniority of age, or otherwise, as shall be agreed. The privilege of seniority is in this case personal; for if the eldest sister be dead, her issue shall not choose first, but the next sister. But, if an advowson descend in coparcenary, and the sisters cannot agree in the presentation, upon the first turn the eldest and her issue, nay, her husband, or her assigns, shall present alone, before the younger, to whom the next turn will in that case belong (*f*). And the reason given is, that the former privilege, of priority in choice upon a division, arises from an act of the parceners, the agreement to make partition; and, therefore, is merely personal: the latter, of presenting to the living, arises from the act of the law: and is annexed not only to the person of the eldest, but to her estate also. A third method of partition is, where the eldest divides, and then she shall choose last; for the rule of law is, *cujus est divisio, alterius est electio*. The fourth method is, where

(*c*) Litt. s. 275.

(*d*) Ib. s. 241.

(*e*) Ib. ss. 243—264.

(*f*) Co. Litt. 166 b; Walker’s case, 3 Rep. 22.

[the sisters agree to cast lots for their shares.] And these are the methods by consent ; with regard to all of which, however, the enactment of 8 & 9 Vict. c. 106, s. 3, which requires that a partition, in order to be effectual, must now be *by deed*, should be borne in mind. Partition by compulsion (the other method mentioned by Littleton) used at the common law to be, where one or more parceners sued out a *writ of partition* against the others ; but that writ being now abolished, partition of an estate held in coparcenary can at present be compelled only by a decree in equity, as in the case of a joint-tenancy. It is, however, to be noticed that there are some things which are in their nature impartible. The mansion-house, for example, and certain hereditaments of an incorporeal kind, shall not be divided ; but the eldest sister, if she pleases, shall have them, and make the others a reasonable satisfaction in other parts of the inheritance ; or if that cannot be, then they shall have the profits of the thing by turns, in the same manner as they take the advowson (*g*).

Besides the method of partition, the estate in coparcenary may be dissolved, 2, *by the alienation of one of the parties*, which destroys the unity of title ; or, 3, *by the whole at last descending to and vesting in a single person*, which brings it to an estate in severalty (*h*) ; and here it is important to add, that for the purposes of tracing descents, parceners, even after they have made partition, are still themselves *in by descent* (*i*).

IV. A *tenancy in common* is, where two or more hold the same land, with interests accruing under different titles ; or accruing under the same title (other than *descent*), but at different periods ; or conferred by words of limita-

(*g*) Co. Litt. 164 b, 165 a.

(*i*) Crosthwaite v. Dixon, 5 Ad.

(*h*) 2 Bl. Com. 191 ; Doe v. Dixon, & El. 634.

5 Ad. & El. 839.

tion, importing that the grantees are to take in distinct shares (*k*).

In this tenancy there is not necessarily any *unity of title*; for one may hold by descent and the other by purchase; or the one by purchase from A. and the other by purchase from B.; nor any *unity in the time of vesting*, for the one's estate may have vested fifty years ago, and the other's but yesterday; nor any necessary *similarity or equality* of interest, for one tenant in common may hold in fee-simple, and the other in tail or for life; one may be entitled to two-thirds, and the other to one-third. Nor is there any *entirety* of interest, for each is seised or possessed of a distinct (though undivided) share; from which also it follows that there is no *survivorship*; unless there should be (and there may be) an express clause giving the benefit of survivorship (*l*). The union consists only in this, that they hold the same land *pro indiviso*.

[Tenancy in common may be created by the destruction of an estate held in joint-tenancy, or of one held in coparcenary, or by special limitation in a deed. By destruction is here meant not such a destruction as brings the joint estate into two or more estates in severalty, but such as puts an end only to the jointure or coparcenary: as if one of two joint-tenants in fee alienes his estate for the life of the alienee, the alienee and the other joint-tenant are tenants in common; for they now have several titles, the other joint-tenant by the original grant, the alienee by the new alienation (*m*). So, if one joint-tenant gives his part to A. in tail, and the other gives his to B. in tail, the donees in tail are tenants in common, as holding by different titles and conveyances (*n*). If one of two parceners alienes, the alienee and the remaining parcener are tenants in common (*o*); because they hold by different titles,—the

(*k*) Co. Litt. 188 b—201 a; *Murray v. Hall*, 7 C. B. 441.

(*l*) *Doe v. Abey*, 1 Mau. & Sel.

(*m*) Litt. s. 292.

(*n*) Ib. s. 295.

(*o*) Ib. s. 309.

[parcener by descent, the alienee by purchase. So likewise, if there be a grant to two *men*, or two *women*, and the heirs of their bodies, here the grantees shall be joint-tenants of the life estate, but they shall have several inheritances (*p*) ; because they cannot possibly have one heir of their two bodies, as might have been the case had the limitation been to *a man and woman*, and the heirs of their bodies begotten (*q*) ; and in this, and the like cases, their issues shall be tenants in common ; because they must claim by different titles, one as heir of A., and the other as heir of B. ; and those, too, not titles by purchase, but descent. In short, whenever an estate in joint tenancy or coparcenary is dissolved, so that there be no partition made, but the undivided tenancy continues, it is turned into a tenancy in common.]

A tenancy in common may also be created by express limitation in a conveyance : but here care must be taken to insert words implying that the grantees are to take distinct, though undivided, shares ; for a grant without such words would give a joint estate. And it is laid down in our books that the common law, in its rules of construction, favoured joint-tenancy rather than tenancy in common (*r*) ; because the divisible services issuing from land (as, for example, rent,) are not divided, nor the entire services (as fealty) multiplied, by joint-tenancy,—as they must necessarily be upon a tenancy in common. Yet where land was given to two, to be holden the one moiety to one, and the other moiety to the other, this was an estate in common (*s*) ; and, where one granted to another *half* his land, the grantor and grantee were also tenants in common (*t*) ;—because, as has been before observed, joint-tenants do not take by distinct halves or moieties ; and by such grants the division of the estate is so plainly expressed, that it is impossible that they should take a

(*p*) Doe *v.* Green, 1 H. & H.
314.

(*q*) Litt. s. 283.

(*r*) Fisher *v.* Wigg, Salk. 392.

(*s*) Litt. s. 298.

(*t*) Ib. s. 299.

joint interest in the whole of the tenements. But, on the other hand, an estate given, in a conveyance *inter vivos* at common law, to A. and B. *equally to be divided* between them, was said to be a joint-tenancy, as it implies no more than what the law has annexed to that estate, viz. divisibility (*u*). Such a limitation, however, in a will or in a conveyance founded on the Statute of Uses, (of which we shall have occasion to treat hereafter,) is certainly a tenancy in common (*x*); for if the tendency of the antient law was to favour a joint-tenancy, the leaning in later times—and particularly of equity—has been the other way (*y*); the right of survivorship being often inconvenient and harsh in its effects. And therefore in wills and the conveyances above referred to—both of which came into use in comparatively modern times, and with regard to which a more liberal construction is in some respects allowed than in the case of common law conveyances—a tenancy in common will sometimes be created by words which at common law would operate as a limitation in joint-tenancy.

We may take this opportunity of remarking, that when lands are given to two or more as tenants in common, it frequently happens that a particular estate is limited to each of the grantees in his share, with remainder over to the other or others of them—as if a man give lands to his two children as tenants in common in tail, and direct that upon failure of the issue of one of them his share shall go over to the other in tail, and *vice versâ*. Such ulterior estates as these are called *cross-remainders*, because each of the grantees has reciprocally a remainder in the share of the other; and it is a rule respecting them, that in a *deed* they can be given only by express limita-

(*u*) *Fisher v. Wigg*, 1 P. Wms. 1 Wils. 341.

17.

(*y*) *Joliffe v. East*, 3 Bro. C. C.

(*x*) *Ratliffe's case*, 3 Rep. 59 b; 25; *Fisher v. Wigg*, 1 P. Wms. 14.
1 Ventr. 32; *Goodtitle v. Stokes*,

tion, and shall never be implied (*z*); though it is otherwise with respect to *wills*, which are here, again, expounded more liberally, with a view to the presumable intent of the donor. Hence in these latter (*i.e.*, in wills), cross remainders may be raised not only by actual limitation, but by any expression from which the design to create them can reasonably be inferred (*a*).

A tenancy in common may be dissolved, in the first place, *by partition*; for tenants in common, like joint-tenants, were compellable by the statutes of 31 Hen. VIII. c. 1, and 32 Hen. VIII. c. 32, (though not at common law,) to divide their lands by writ of partition, and since the abolition of that writ, they may be driven to a partition by means of proceedings in equity. They may also effect a partition by mutual agreement without having recourse to the court; though by 8 & 9 Vict. c. 106, s. 3, it is now made essential that such partition shall be by *deed*. A dissolution of the common tenancy may also be brought about *by uniting all the titles and interests in the estate held in common in one tenant*, by purchase or otherwise, which brings the whole to one severalty.

(*z*) *Cole v. Levingston*, 1 Vent.
224; *Doe v. Worsley*, 1 East, 416.

(*a*) 1 Prest. Est. 94, 115; and
see Co. Litt. 195 b, n. (1), by
Butler.

CHAPTER IX.

OF USES AND TRUSTS.



THE modes of ownership hitherto considered belong to the division of *legal* estates, to which our attention was in the first instance to be directed; it is now time to take notice of those of the *equitable* kind; which as compared with estates of the legal kind, are of a posterior and derivative character, and little (if at all) affected by those principles of feudal tenure which have hitherto received our chief consideration.

The only example of an equitable estate to which we have hitherto had occasion to refer, is that which is called *the equity of redemption*, the estate (that is to say) which resides in the true owner after he has conveyed away his legal estate by way of mortgage; but other equitable interests of a miscellaneous and somewhat intricate nature remain to be examined; and all of these are embraced under the general appellation of *Uses* and *Trusts*.

Uses and trusts were in their origin closely united, but not identical (*a*). A *trust* was the confidence reposed by one man in another when he invested him with the nominal ownership of property, to be dealt with in some particular manner, or to be held for some particular person or purpose.

If the trust was to hold land for the benefit of another person generally and to let him receive the profits, this sort of interest or right in the latter person was called a

(*a*) Hist. Eng. Law, by Reeves, 516, 520; Co. Litt. by Butler, vol. iii. p. 364, vol. iv. pp. 340, 271 b, n. (1), 290 b, n. (1).

use or *trust* to distinguish it from the legal estate in the *trustee* (*b*).

[The general idea of a use or trust answered more to that of the *fidei commissum* than to the *usus fructus* of the civil law (*c*); for the latter was merely the temporary right of using a thing without any dominion over the substance (*d*); but the *fidei commissum* was the disposal of an inheritance to one in confidence, that he should dispose of it or of the profits, at the will and for the benefit of another (*e*); which right of the latter was originally a *jus precarium* (*f*)—that is, dependent on the good conscience of the fiduciary (or trustee),—but by subsequent institution it acquired a different character (*g*), and was recognised as a *jus fiduciarium*, and had a legal remedy given to it, and a particular magistrate, the *prætor fideicommissarius*, assigned to enforce its observance (*h*).]

This notion of a use was transplanted into England from the civil law, about the close of the reign of Edward the third (*i*); and the people who introduced it were the foreign ecclesiastics, their object being to evade the statutes of mortmain. To explain this, we must remark that the religious houses to which these ecclesiastics belonged, were *corporations*; and as corporations never die, the lands which belonged to them were consequently said to be *in mortuâ manu*, or in *mortmain*, because they produced no advantage to the feudal lord by way of escheat or otherwise (*k*): and therefore, by the policy of the antient law,

(*b*) Blackstone says that “Uses and trusts were in their original of a nature very similar, or rather exactly the same” (vol. ii. p. 327). Lord Bacon expressly distinguishes a *use* from a “special” or “transitory” *trust*.—(Bac. Read. Us.) And Ld. Ch. Baron Gilbert says, “That a use is the equitable right to have the profit of lands, the legal estate whereof is in the feoffee,

“only to the trust and confidence reposed in him.”—(Gilb. Uses, ed. by Sugd. 374.)

(*c*) Gilb. Uses, by Sugd. 3, (n.).

(*d*) Ff. 7, l. 1.

(*e*) Inst. 2, t. 23, ss. 1, 2.

(*f*) 1 Cruise, Dig. 394.

(*g*) Ibid. 395.

(*h*) Inst. 2, tit. 23, s. 1.

(*i*) 1 Sand. Uses, p. 17.

(*k*) Co. Litt. 2 b.

corporations were prohibited from the purchase of land, unless a licence in mortmain was obtained for the purpose. This principle was enforced by a variety of statutes, called the statutes of mortmain, which the clergy (*scil.* the lawyers) of the day were constantly exerting their ingenuity to evade. One of their expedients was to obtain grants of land, not to their religious houses directly, but to some person to hold to the use of such religious houses. A gift of this kind conferred no estate or interest whatever, in contemplation of law, on the corporations themselves; for the feudal tenure looked no further than to the legal estate which was in the actual and ostensible tenant (*l*). The use, therefore, declared upon such a gift, being, in the view of the ordinary courts of justice, a non-entity, escaped the operation of the statutes of mortmain; while the clerical chancellors of those days maintained the doctrine that the use, though it was nothing at law, was binding in conscience, and ought, like the *fideicommissum* of the Romans, to be enforced; and just as the *fideicommissa* of the civil law were placed under the protection and jurisdiction of a special magistrate, so the uses or trusts in question were protected by the chancellors in their Court of Chancery; a tribunal which administered justice upon the principles of *equity*, as contradistinguished from the common law (*m*).

As regards the religious houses themselves, this evasive contrivance of uses proved to be of little avail, being crushed in its infancy by the statute 15 Rich. II. c. 5, which enacted that, for the future, uses should be subject to the statutes of mortmain, and forfeitable like the lands themselves, unless the licence of the crown was first duly obtained. Yet the idea, being once introduced, was afterwards applied to purposes not contemplated by its inventors, and took root in our system of jurisprudence; being chiefly recommended by two considerations—first, that

(*l*) 1 Cruise, Dig. 402.

(*m*) 3 Bl. Com. 51; Hist. Eng. Law, by Reeves, vol. iii. p. 192.

uses were, as to the manner of their creation and transfer, and the modifications of interest to which they might be subjected, free from the restrictive rules which applied to the old feudal estates; and secondly, because uses were not, in general, liable, like the feudal estates, to forfeiture,—originally, indeed, not even in cases of treason (*n*). [And owing to this latter exemption in particular, it happened that, during our long wars in France and the subsequent civil commotions between the houses of York and Lancaster, uses grew almost universal, through the desire that men had of securing their estates from forfeiture when each of the contending parties, as they became uppermost, alternately attainted the other. And about the reign of Edward the fourth, before whose time Lord Bacon remarks that there are not six cases to be found relating to the doctrine of uses, the courts of equity began to reduce them to something of a regular system (*o*).]

With respect to the kinds of property that might be the subject of a use, we may observe, in general, that all corporeal hereditaments, whether in possession, remainder, or reversion,—and many that are incorporeal, for example, rents and advowsons,—might be granted to a use; but not those of which the use was inseparable from the possession, as ways, commons, and the like, or things *quæ ipso usu consumuntur* (*p*).

The use was commonly created as follows:—The owner or actual tenant of the land conveyed it by feoffment, upon the trust or confidence, which often rested upon merely oral agreement (*q*), that the feoffee should hold the land to the use of some third person, or it might be to the use of the feoffor himself (*r*). The effect of this transaction was that the legal seisin or feudal tenancy of the land became severed from the beneficial ownership or use; the former being

(*n*) 33 Hen. 8, c. 20.

(*o*) Bac. Read. Uses.

(*p*) 2 Bl. Com. 330; 1 Sand. Uses, p. 70; 1 Cruise, Dig. 408; W.

Jones, 127; Gilb. Uses, 485, 3rd ed. by Sugd.

(*q*) 1 Sand. Uses, p. 17.

(*r*) 1 Cruise, Dig. 392.

vested in the trustee, otherwise called the *feoffee to uses*, the latter, in the person to whose use it was held, and who received the appellation of *cestui que use*. Of these divided interests, that of the feoffee alone obtained protection in the courts of common law, where he was considered the absolute owner; but in equity, the *cestui que use* was regarded as the true proprietor, and might compel the feoffee to uses to account to him for the rents and profits, and to hold the land at his disposal.

Uses might also be created by implication, from the nature of the conveyance itself; *e. g.*, if a man made a feoffment in fee to another, without any consideration, equity presumed that he meant it to the use of himself, and therefore raised an implied use for his benefit (*s*); unless, indeed, the feoffor expressly declared that the feoffment was to the use of another, and then of course nothing was presumed contrary to such express declaration (*t*); and uses which thus returned by way of implication to the grantor himself, were called *resulting uses* (*u*). Uses might also be raised upon mere contracts, without the formality of any conveyance, and this either expressly or by implication (*x*); for if a man, in consideration of natural affection, *covenanted to stand seised of his land to the use of some near relative named*, or to the use of a wife, actual or intended, a court of equity, even though no valuable consideration passed, would enforce the use, and treat the covenantor thereafter as a mere trustee for the *cestui que use* (*y*); also, if a man *bargained and sold* his land to another for a pecuniary consideration, but made no actual feoffment or conveyance, equity would consider the estate as belonging to the party who had paid the money,

(*s*) 1 Sand. Uses, p. 68; Vin. Uses, F.; 1 Cruise, Dig. 442, 446, 450; Gilb. 118.

(*t*) 2 Bl. Com. 330.

(*u*) Cruise, Dig. ubi sup.; 2 Bl. Com. 335; Doe v. Rolfe, 8 Ad. &

El. 650.

(*x*) 1 Sand. Uses, p. 118; vol. 2, p. 50; Chudleigh's case, 1 Rep. 139 b.

(*y*) 2 Bl. Com. 304; Gilb. Uses, 93; Sugd. Introd. to Gilb. xlvii.

and would consequently hold the bargainor to be seised of the land from thenceforth to the use of the bargainee (z). *with the seisin or legal ownership it could be duly conveyed to the latter*

In general all persons were of capacity thus to become trustees and to hold to a use (a). There were, however, some exceptions. For persons attainted and aliens were for this (as for all other purposes), disqualified from holding land (b); and the doctrine was also established, that neither the king nor queen, on account of their dignity royal,—nor any corporation aggregate, on account of its limited capacity,—could be seised to any use but their own (c).

As the person seised to uses was considered at the common law as the absolute owner, his estate was of course subject originally to all the incidents which attached to the legal estate in ordinary cases; and therefore it devolved to his legal representative at his death; and might be aliened or forfeited by his act while living; or might become subject to execution for his debts, or to escheat for want of an heir; and his wife also was entitled to dower therein: and where the person so seised was a married woman, her husband surviving her, took an estate by the curtesy therein (d). And the alienee or other person so deriving title from the person seised to uses, was in some cases entitled to hold free from the trust; for the Court of Chancery gave relief originally only against the person himself in whom the trust was first reposed, and not against his alienees; but [this was altered in the reign of Henry the sixth with respect to the heir of the original trustee (e), and afterwards by parity of reason with respect to such alienees as had purchased from the trustee either without consideration, or

(z) 2 Sand. Uses, p. 50.

(a) 1 Sand. Uses, p. 62.

(b) Ib. 65.

(c) 2 Bl. Com. 330; Sand. Uses, ubi sup.

(d) 1 Sand. Uses, pp. 75, 76; 1 Cruise, Dig. 403; Gilb. Uses, by Sugd. 3rd ed. p. 15; 2 Bl. Com. 330.

(e) Keilw. 42; Year-book, 22 Edw. 4, c. 6.

[with express notice of the trust or use (*f*). But a purchaser for value without notice, or a creditor obtaining execution, might still have held the land discharged of the trust or use (*g*): and so if the person seised to uses died without an heir, or committed a forfeiture, or married, neither the lord who entered for his escheat or forfeiture, nor the husband who retained the possession as tenant by the curtesy, nor the wife to whom dower was assigned,—were liable to perform the trust or use; because they were not parties to the original trust, but came in by act of law, and this, although their title, in reason, was no better than that of the heir (*h*).]

The capacity of becoming a *cestui que use*, was even more extensive than that of becoming a trustee; for all persons competent to take a conveyance of land might also take an interest by way of use (*i*).

The nature of this use, constituting as it did a new sort of ownership wholly distinct from the legal estate, demands particular consideration. It was in its nature so exclusively *equitable*, that the courts of common law accounted the *cestui que use*, if out of possession, as a mere stranger to the land; and if in possession, as a mere tenant at sufferance. They consequently allowed no effect to his alienation or demise of the land, if made without the consent of the trustee; and they held it not liable to forfeiture for his default, nor to execution for his debts (*k*). In equity, however, the properties or incidents of this kind of ownership were in a great measure assimilated to those of the legal estate; while on the other hand they were settled, in certain respects, upon principles more advantageous to the owner; and these properties or incidents of the use or equitable estate were principally as follows:—1. Contrary to the course of the common law with respect to freehold estates, uses even for life, or for a greater interest, might

(*f*) Keilw. 46.

(*g*) Gilb. Uses, by Sugd. ubi sup.

(*h*) 1 Sand. Uses, p. 229.

(*i*) Ibid.

(*k*) 2 Bl. Com. 331; 1 Sand. Uses,

pp. 73, 74.

be created or assigned by secret deeds between the parties, and might be devised (*l*) ; for as the legal estate in the soil was not transferred by these transactions, no *livery of seisin* was necessary. 2. Uses might be limited for future freehold estates, not only by way of remainder, but also without any prior particular estate to support them,—estates in possession, reversion, or vested remainder, being called uses *in esse*, and these other future estates being called uses *in futuro*, *contingent* uses, or uses in *possibility* (*m*). 3. [A use was not subject to forfeiture; and did not escheat upon attainder, or other defect of blood; for escheats and the like were the consequences of *tenure*, and uses were not the subjects of tenure. 4. Again, no wife could claim dower, or husband curtesy, of a use (*n*) ; for no trust was declared for their benefit, in the original grant of the estate. And therefore it became customary, when uses became general, to settle before marriage some joint estate to the use of the husband and wife for their lives, which was the origin of jointures. 5. Lastly, a use could not be extended by writ of *elegit*, or other legal process, for the debts of the *cestui que use* ; though the legal estate was liable to such execution for the debts of the legal tenant.]

The state of things above described was, however, attended with the following inconveniences, namely :—A person in possession of the land as apparent owner, would often, in reality, be a mere *cestui que use*, and consequently no more than a tenant at sufferance in regard to the legal estate ; or he might, on the other hand, be a mere trustee, the equitable ownership and the right to receive the profits residing in another (*o*) : and as putting an estate into use was often a secret transaction, with which strangers had no means of becoming acquainted, they were in con-

(*l*) Bac. Read. Uses, 312, 308 ; Uses, (G).
1 Sand. Uses, p. 72.

(*m*) Chudleigh's case, 1 Rep. And. 75.

136 b, 211 b ; Lovics' case, 10 Rep. (o) Bac. Ab. Uses and Trusts, p. 83.
85 a ; Bac. Read. Uses ; Bac. Ab.

stant danger of being deceived as to the true state of the title (*p*). [We cannot therefore be surprised at Lord Bacon's complaint that this course of proceeding "was turned to deceive many of their just and reasonable rights. A man that had cause to sue for land, knew not against whom to bring his action, or who was the owner of it. The wife was defrauded of her thirds, the husband of his curtesy, the lord of his wardship, relief, heriot, and escheat, the creditor of his extent for debt, and the tenant of his lease" (*q*). These inconveniences were gradually remedied more or less, by a succession of statutes; which made the lands liable to be extended by the creditors of the *cestui que use* (*r*); allowed actions for the freehold to be brought against him if in actual permanency or enjoyment of the profits (*s*); made him liable to actions of waste (*t*); established his conveyances and leases made without the concurrence of the trustee (*u*); and gave the lord the wardship of his heir, with certain other feudal perquisites (*x*).

These statutes all tended more or less to make the *cestui que use* the real owner of the estate (*y*); and this idea was carried out (in intention at least) by that celebrated Act passed in the reign of Henry the eighth, (27 Hen. VIII. c. 10,) which is commonly called the Statute of Uses. That statute, after reciting the various inconveniences before mentioned, and many others, enacts that, where any person or persons shall be seised of lands, tenements, or other hereditaments (*z*) to the use, confidence, or trust of any other person or persons, or body politic, by any

(*p*) 1 Sand. Uses, pp. 17, 18, 23;
Preamble of Stat. of Uses.

(*q*) Bac. Use of the Law, 153.

(*r*) 50 Edw. 3, c. 6; 2 Rich. 2,
st. 2, c. 3; 19 Hen. 7, c. 15.

(*s*) 1 Rich. 2, c. 9; 4 Hen. 4, c.
7; 11 Hen. 6, c. 3; 1 Hen. 7, c. 1.

(*t*) 11 Hen. 6, c. 5.

(*u*) 1 Rich. 3, c. 1.

(*x*) 4 Hen. 7, c. 17; 19 Hen. 7,
c. 15.

(*y*) 1 Rich. 3, c. 5.

(*z*) The words in the Act are
"honours, castles, manors, lands,
"tenements, rents, services, rever-
"sions, remainders, or other here-
"ditaments:" 27 Hen. 8, c. 10,
s. 1.

[means whatsoever, (whether the use, confidence, or trust be in fee simple, fee tail, for life or for years, or otherwise, and whether it be in possession, remainder or reverter,) the estate of the person or persons so seised to uses shall be deemed to be in him or them that *have* (*i. e.*, are beneficially entitled to) the use, trust, or confidence: and he or they shall thenceforth stand and be seised or possessed of the said lands or other hereditaments of and in the like estates as he or they had in the use, trust, or confidence. The effect of this statute, wherever it comes into operation, is therefore to *execute* the use: that is, it instantaneously, and as “by a kind of parliamentary magic,” transmutes the equitable interest of the *cestui que use* into a legal estate of the same nature, and makes him the actual or legal tenant of the land in lieu of the feoffee to uses, or trustee: whose estate, on the other hand, is, at the same moment, annihilated (*a*). The use is also said to be *transferred into possession* (*b*); that is, the legal estate conferred on the *cestui que use* is considered as an estate in actual seisin or possession (according to its nature), and such as requires no further ceremony for its completion (*c*). Thus if a feoffment be made to A. and his heirs to the use of B. and his heirs, an estate in fee simple in possession is *eo instanti* vested by force of the statute, and without livery of seisin, in B.; and A. takes nothing (*d*): or if a person seised in fee bargains and sells to A. for a year, for a pecuniary consideration—which we may remember constitutes a seisin in the bargainor to the use of A.—A. immediately becomes, by force of the statute and without entry, possessed of the land for the term of one year; the reversion remaining in the bargainor.

Here we must observe, however, that to bring the statute into operation, it is essential that there should

(*a*) 2 Bl. Com. 333.

(*c*) *Burdett v. Spilsbury*, 6 Man.

(*b*) 1 Saund. 251, n. (2), 234 b, n. (4).

& Gr. at p. 456, *in notis*.

(*d*) *James v. Plant*, in error, 4 Ad. & El. 766.

[not only be a use, but a person *seised* to the use (*e*); for its provisions are confined to the case where “one person shall be seised to the use of any other person.” And therefore, where an existing term of years is limited to a use, as where a term of 1000 years is assigned to B. to the use of C., the provisions of the statute do not apply, and the use will consequently remain unexecuted; for of such estates as these, (being mere chattels,) the termor is not *seised*, but only *possessed*; and therefore there is no person “seised to a use” as the statute requires (*f*). Upon the same principle of close adherence to the words of the statute, the seisin must be vested in a different person from the *cestui que use* himself; for otherwise the case does not arise of one person being seised to the use of another (*g*). And the seisin should be for an estate as extensive as the use itself; for the statute only executes the use so far as there is a corresponding seisin. Thus if land be conveyed to A. for life to the use of B. in fee; the statute will vest the legal estate in B. only during the life of A. (*h*).

(*e*) 1 Sand. Uses, pp. 97, 113, 133.

(*f*) 1 Sand. Uses, p. 198; Gilb. Uses, 79; Bac. Read. Uses, 335; Dillon v. Fraine, Poph. 76.

(*g*) 1 Sand. Uses, p. 96.

(*h*) 1 Sand. Uses, p. 113; Gilb. Uses, 430. The curious doctrine of *scintilla juris* arose in this way, namely, where land is conveyed by feoffment to A. and his heirs, to the use of B. for life, remainder to the use of his unborn sons successively in tail, remainder to the use of C. in fee, it is necessary, in order that the statute should transmute all these uses into legal estates, that there should be a seisin out of which to execute not only the uses *in esse* to B. and C., but also the uses *in futuro* to the sons of B.:

where then was the seisin out of which to execute the uses *in futuro*, or out of which these latter uses were to arise? The actual seisin of the feoffee A. is exhausted before any son of B. is born, being drawn out of A. to execute the uses *in esse* to B. and C.; which uses, taken together, make up the entire inheritance. To meet this difficulty, it was considered that there remained in the feoffee, though not an actual seisin, yet a *scintilla juris*, or possibility of future seisin, to serve the future uses as they came into *esse*,—an opinion which, however, was not generally assented to. (See Sugd. Pow. 8th ed. p. 19.) The controversy, however, is now disposed of by the Act 23 & 24 Vict. c. 38,

[The Statute of Uses has been, in other respects also, very rigorously construed by the judges. Thus:—1. It was held that *no use can be limited upon a use* (i). Thus where A., being seised, bargains and sells for a pecuniary consideration to B., the legal estate passes by force of the statute to B., to whom the use is limited by the effect of the bargain and sale; and where A. bargains and sells to B., *to the use of C.*, the judges held that in this case also the legal estate passes to and remains in B., and that C. takes nothing; for the statute executes the first use limited to B., but not the second use limited to C.; the latter use being a mere nullity, inasmuch “as no use can be engendered of a use” (k). Upon the same principle, a feoffment to A. to the use of B. in trust for C., was held to vest the legal estate in B.; and C. was allowed to take nothing (l); and yet, when the first use was executed in B., he might, without much impropriety, have been considered as seised to the use of C.: which second use the statute might as well have been permitted to execute as it did the first (m); but it was otherwise determined by the judges. 2. It was held also, that *where the person entrusted has any active duty to perform, he cannot be considered as holding to a use, or at least not to such a use as the statute executes* (n). Thus, if lands be given to B. and his heirs, with a direction to receive and pay over the profits to C., this shall be no use in C.; though, on the other hand, if the direction were to permit C. to take the profits, this would be a use executed

(see cases)

s. 7, which has enacted, that such uses shall take effect when and as they arise by force of, and by relation to, the original seisin to the uses; and that no *scintilla juris* shall be necessary or deemed to remain for the purpose in the original feoffee to uses.

(i) Gilb. Uses, 347; 1 Sand. Uses, p. 198; 2 Bl. Com. 335;

Gilbertson v. Richards, 4 H. & N. 297.

(k) Tyrrell's case, Dy. 155.

(l) 2 Bl. Com. 336; Gilb. Uses, Sugd. lx.

(m) Bl. Com. ubi sup.

(n) Bro. Feoff. al Uses, 52. See also 2 Saund. by Wms. 11 a, n. (17); Browne v. Ramsdon, 8 Taunt. 564; Doe v. Scott, 4 Bing. 507.

[in C. ; for, in this latter case, there is no *active* duty appointed for B. to perform (o).

The uses which were thus excluded from the operation of the statute, did not fail to obtain protection from the courts of equity; for it was evident that the person directed to hold to the uses was never intended by the parties to have any beneficial interest, and that his capacity was merely fiduciary (p). Therefore the Court of Chancery determined, that though the purposes pointed out were not uses executable by the statute, yet a trust subsisted in the person directed to perform the purpose; and that such trust was binding, if not at law, yet in equity; and accordingly, the interests in question, though rejected at law as *uses*, became established in equity, as *trusts* (q). A similar protection was also given in equity to all those confidences which imposed active duties on the trustee; and these seem always to have been described as *trusts*, or special trusts, and never to have received the appellation of uses (r); and they were obviously of a very different nature from the uses aimed at by the Statute of Uses.

It is evident, that if it is intended to give C. a trust (or equitable) estate, and not a legal one, it will not suffice to convey by feoffment to B. and his heirs "to the use of," or even "in trust for," C. and his heirs; for that use or trust would be executed by the statute, and the legal estate would vest in C.; but to accomplish the intention, it is necessary to convey by feoffment to "A. and his heirs to the use of B. and his heirs, in trust for, or to the use of, C. and his heirs:" for there being in this case a use upon a use, the first use only will be executed by the statute, and the second use or trust estate will be undisturbed. The intention may also be accomplished by enfeoffing "A. and his heirs to the use of A. and his

(o) *Barker v. Greenwood*, 4 Mee. & W. 429; *Adams v. Adams*, 6 Q. B. 860; *Doe d. Shelley v. Edlin*, 4 Ad. & El. 582; *Williams v.*

Waters, 14 Mee. & W. 166.

(p) 2 Bl. Com. 336.

(q) *Ibid.*

(r) *Bac. Read. Uses*, 895.

[heirs, in trust for C. and his heirs ;” for though the first use is not such a use as the statute executes (the seisin and the use being vested in the *same* person), yet there cannot be a use upon a use, whether the statute executes the first use or not ; and therefore the interest of C. is not a use executed, but a trust (*s*). In like manner, if an existing term for 1000 years be assigned “to A. to the use of C. and his heirs ;” here A. not being seised, but possessed only, to the use of C., the statute will not execute the use, and A. remains trustee for C. And as to personal estate generally, it was never considered capable of being held to a *use*, in the proper meaning of that term (*t*) ; and the Statute of Uses is inapplicable to it (*u*).]

The courts of equity having thus acquired jurisdiction in the matter of trust estates in lands, have by a long series of uniform decisions, with some assistance from the legislature, raised up a new jurisprudence, by which trusts are made to answer all the beneficial ends of uses, without their inconveniences (*x*) ; and in connection with this new jurisprudence, it falls properly to us in this place to consider, in somewhat greater detail, the nature of the estate of the trustee, and that of the *cestui que trust*.

First, with respect to the word “trust” itself : it has varied somewhat from its antient meaning, in which it was synonymous with use ; and it now denotes a confidence (not amounting to a use within the statute) reposed by one man in another with respect to property committed to him as the nominal owner, the term *trust*, as well as *trust estate*, being applied to express the beneficial interest of the *cestui que trust*, as well as the confidence reposed in the trustee.

Besides being distinguished as *active* and *passive*, trusts

(*s*) *Tipping v. Cousins*, Comb. 312 ; *Doe d. Lloyd v. Passingham*, 6 Barn. & Cress. 305.

(*t*) *Gilb. Uses*, by Sugd. 485 ; 1 Sand. Uses, p. 70.

(*u*) 1 Sand. Uses, 10 ; 3 Bl. Com. 432 ; *The Queen v. Abrahams*, 4 Q. B. 159.

(*x*) 2 Bl. Com. 337.

are also frequently distinguished as *executory* or *executed*, being executory, where the party, whose benefit is designed, is to take through the medium of a future instrument of conveyance which the trustee is directed to execute for the purpose; and being executed, where no such future conveyance is contemplated, but the trust estate is completely limited in the first instance (*y*). Again trusts may be either *express* or they may be *implied*. Thus, if the legal estate in land be conveyed to A. upon such trusts as the grantor shall thereafter appoint; as such trusts are, prior to appointment, incapable of taking effect, and as it is clear that A. is not intended to hold the land for his own benefit; there arises, by necessary implication, until the appointment be made, a trust for the grantor (*z*): and such trusts, so raised by implication for the benefit of the grantor himself, are called *resulting* trusts (*a*). So if an estate be purchased in the name of one person, and the consideration-money belongs to or is paid by another, the land purchased will be subject to a trust for the person to whom the money belonged or by whom it was paid (*b*). And an agreement for the sale of land, when once concluded, will make the vendor a trustee in equity for the purchaser (*c*).

Though neither the crown nor a corporation aggregate could be seised to any use but their own, the case is otherwise with respect to a trust (*d*); and it may be laid down generally, that every description of person capable of holding land, is capable also of being a trustee. It is also a maxim in equity, that a trust shall never fail on account of the disability of the person appointed to perform it, or even from the omission to appoint a trustee; the court will consider the trust, when once substantially

(*y*) 1 Fonbl. Treat. Eq. 441, n.;
Bac. Abr. Uses, A.; Butl. Fearn, 90, 118, 139, &c., 9th ed.

(*z*) 1 Cruise, Dig. 477.

(*a*) Sayre v. Hughes, Law Rep. 5 Eq. Ca. 376.

(*b*) 1 Sand. Uses, p. 212.

(*c*) Sugd. Vend. 154, 5th ed.;
and see Clarke v. Ramuz, 1891, 2 Q. B. 456.

(*d*) 1 Sand. Uses, p. 227.

constituted, as fixing itself upon the person who, by reason of such disability or omission, becomes entitled to the legal estate, and will compel him to observe the trust (*e*).

The estate of the trustee is subject at *law* to all the incidents which attend an ordinary ownership of land. It devolves, therefore, when he dies, to his legal representative; and is liable, while he lives, to alienation by himself; but the claim of the representative, and in general also of the alienee, is subject, in contemplation of equity, to the original trust (*f*); but with regard to alienees, the same rule is established as formerly with respect to uses, that a person who becomes alienee by purchase, for valuable consideration, and without notice of the trust, is not compellable in equity to its observance (*g*). As his claim is not inferior, in point of natural justice, to that of the *cestui que trust*, equity will not interpose between them; the consequence of which is, that the legal title of the purchaser takes effect for his own benefit, while the *cestui que trust* is left to his remedy against the alienor personally, for his breach of trust. On the other hand, where the legal estate still remains in the trustee or his heir or legal representative, but the purposes of the trust are satisfied, he is always compellable to divest himself of it in favour of the person beneficially entitled, by executing a proper conveyance. Also, under the provisions in this behalf contained in the Trustee Act, 1893 (*h*), repealing (but re-enacting with simplifications and other amendments) the like provisions contained in the Trustee Acts, 1850 and 1852 (*i*), in all or any of the following cases, that is to say:—When the High Court appoints or has appointed a new trustee; or where a trustee entitled to or possessed of any land either solely or jointly with any other person is an infant, or is out of the jurisdiction of the High Court, or cannot be found; or where it is uncer-

(*e*) 1 Sand. Uses, p. 226.

(*f*) Gilb. Sugd. 13, n. (5).

(*g*) 1 Sand. Uses, p. 228.

(*h*) 56 & 57 Vict. c. 53.

(*i*) 13 & 14 Vict. c. 60; 15 & 16 Vict. c. 55.

tain who was the survivor of two or more trustees jointly entitled to or possessed of any land; or where as to the last trustee known to have been entitled to or possessed of any land, it is uncertain whether he is living or dead; or where there is no heir or personal representative to a trustee who was entitled to or possessed of land and has died intestate as to that land; or where it is uncertain who is the heir or personal representative or devisee of a trustee who was entitled to or possessed of land, and is dead; or where a trustee jointly or solely entitled to or possessed of any land has been required, by or on behalf of a person entitled to require a conveyance of the land, to convey the land and has wilfully refused or neglected to convey the land for twenty-eight days after the date of requirement,—the High Court may make an order vesting the land in any such person as the Court may direct (*k*); or the Court may appoint some person to execute the necessary conveyance in lieu of the trustee or his heir or representative (*l*).

It is further to be noticed that, at *law*, the estate of the trustee was liable to be taken in execution for his debts (*m*); and his wife was entitled to dower (*n*); and the husband of a female trustee was entitled to curtesy (*o*). Upon these points it will be recollected that the position of the feoffee to uses, before the statute of Henry VIII., was the same; while, on the other hand, *cestui que use* remained without protection from the effect of these claims. But the modern trust is different from the use in all these respects, and is protected against all such claims both at law and in equity. Formerly, also, the estate of the trustee was liable to forfeiture and escheat (*p*); but even prior to the Act 33 & 34 Vict. c. 23, by which escheat and forfeiture for treason or felony were taken away, it had been provided by 13 & 14

(*k*) 56 & 57 Vict. c. 53, s. 26.

(*n*) 2 Ves. sen. 634.

(*l*) Ibid. s. 33.

(*o*) 7 Vin. Ab. 159.

(*m*) 1 Sand. Uses, pp. 230, 231;

(*p*) 1 Sand. Uses, p. 230.

1 P. Wms. 278.

Vict. c. 60, ss. 46, 47, that no land, stock, or chose in action, held in trust or by way of mortgage, should escheat or be forfeited so as to affect the interest of the *cestui que trust* or mortgagor, by reason of the attainder or conviction of the trustee or mortgagee for any offence; and by the Trustee Act, 1893, s. 25, which continues the like provision contained in 15 & 16 Vict. c. 55, s. 6, a new trustee may be appointed in the place of any trustee becoming convicted of any felony (*q*).

If we turn now to the *cestui que trust*, his interest was not originally the subject of protection at all at law, but subsisted only in contemplation of equity (*r*); being sometimes a mere *charge* on the land; the *ownership* of the land being vested in another person; but at other times and more usually amounting, in contemplation of equity, to the substantial and actual *ownership*; and then the *cestui que trust's* estate is modelled, in general, upon the rules of the common law with regard to legal estates, for *æquitas sequitur legem* (*s*). Thus, there may be an equitable estate (just as there may be a legal estate) for life or years, or in fee or in tail; and in the case of an equitable estate tail, the method of barring the entail is the same as if the estate were legal. So an equitable interest may be either in possession or in expectancy, as in the case of a legal estate; but where the equitable estate in expectancy is in the nature of a *contingent remainder*, it was never subject, and is not subject, to the common law rule whereby it was defeated in the event of the determination, before the contingency happened, of the particular estate upon which it depended (*t*). The doctrine of “merger”

(*q*) The provision extends also to the case of a trustee becoming a bankrupt; but the like provision had been already made by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 147.

(*r*) *Britten v. Britten*, 4 Tyrw.

473; *Roe v. Read*, 8 T. R. 118.

(*s*) 2 Bl. Com. 330.

(*t*) 1 Prest. Est. 241; *Hopkins v. Hopkins*, Cas. temp. Talb. 44; 1 Atk. 590; *Astley v. Micklethwait*, 15 Ch. Div. 59; *Abbiss v. Burney*, 17 Ch. Div. 211.

also seems to apply to equitable as well as to legal estates,—providing the coalescing estates be both of the equitable description, and the merger will not be productive of any injustice or inconvenience (*u*). So, the same rules of construction will in general apply to equitable as to legal estates; and particularly the rule in Shelley's case (*x*). A trust of inheritance is also subject to the curtesy of the husband of *cestui que trust*, as if it were an estate at law (*y*); but until a comparatively recent period, it was not subject to dower, a peculiar anomaly (*z*), which has now been swept away by the Dower Act, 1834 (3 & 4 Will. IV. c. 105) s. 2. Again, a trust estate, though formerly protected like a use from execution for debt, is now (with more regard to justice) made subject to such execution; for, by the Statute of Frauds (29 Car. II. c. 3), s. 10, it was made liable to the extent of one-half, and by 1 & 2 Vict. c. 110, it has been made liable to the extent of the entirety, to be taken in execution on a judgment.

But a trust estate may also be subjected, like a use, to limitations unknown to the common law; and it has always been capable of being created or assigned (even for an estate of freehold), by deed without livery, or by last will and testament; and originally even by parol; although now, by the Statute of Frauds, all trusts and confidences of lands, tenements or hereditaments, except such as arise by implication or construction of law, must be manifested and proved by some writing signed by the party, or by his last will in writing (*a*); and the same statute prescribes writing for any grant or assignment of a trust estate (*b*). The estate of the *cestui que trust* was never subject to

(*u*) 3 Prest. Conv. 558; Phillips v. Phillips, 1 P. Wms. 41.

(*x*) Fearne, by Butl. 124, 9th ed.; Bale v. Coleman, 1 P. Wms. 142.

(*y*) 1 Sand. Uses, p. 205.

(*z*) 2 Bl. Com. 337.

(*a*) 29 Car. 2, c. 3, ss. 7, 8.

(*b*) 29 Car. 2, c. 3, s. 9; Harris v. Pugh, 4 Bing. 335; Scott v. Scholey, 8 East, 467.

forfeiture, unless for treason (*c*) ; and it did not escheat to the crown for want of inheritable blood, for the defect of an heir conferred no title on the crown, but merely enabled the trustee to hold the land discharged of the trust and for his own benefit (*d*) ; and when the lands were held of a mesne lord, the rule was the same ; for neither on the attainder of the *cestui que trust* (unless for treason) (*e*), nor on the failure of heirs (*f*), did the estate of the *cestui que trust* escheat to the lord, but the trustee took it for his own benefit, as in the case where the crown was lord. However, now by the Intestates' Estates Act, 1884 (47 & 48 Vict. c. 71), it has been provided, that upon the death intestate of the *cestui que trust* without heirs, the lands shall not remain beneficially to the trustee, but shall escheat to the crown, like as the legal estate would have done,—an enactment which, *semble*, applies to mesne lords as well as to the crown as lord paramount.

And before concluding this chapter, it will be useful to here summarize certain modern statutory provisions regarding the devolution of trust estates, meaning thereby the legal estate which is vested in the trustees or trustee. And firstly, under the Vendors and Purchasers Act, 1874 (*g*), by sect. 5, as amended by sect. 48 of the Land Transfer Act, 1875 (*h*), upon the death of a bare trustee intestate his fee simple trust estates descended into his legal personal representative,—a provision which has now been superseded and also repealed by the Conveyancing Act, 1881, s. 30, to be presently mentioned ; and by sect. 6, now replaced by the Trustee Act, 1893, s. 16, when the bare trustee is a married woman, she is enabled to convey

(*c*) 1 Sand. Uses, pp. 206, 207 ; Hob. 214 ; Attorney-General *v.* Sands, Hard. 490 ; 33 Hen. 8, c. 20 ; 13 & 14 Vict. c. 60, ss. 46, 47.

(*d*) 2 Bl. Com. 337 ; Burgess *v.* Wheate, 1 W. Bl. 123 ; 1 Eden, 177.

(*e*) 1 Sand. Uses, p. 288 ; 1 Hale, P. C. 249.

(*f*) Gallard *v.* Hawkins, 27 Ch. Div. 298.

(*g*) 37 & 38 Vict. c. 78.

(*h*) 38 & 39 Vict. c. 87.

her fee simple trust estates as if she were a *feme sole*,—a provision which the Married Women's Property Act 1882 (*l*) has, *semble*, extended to married women trustees, whether they are bare trustees or trustees simply,—at least, so far as regards trust estates vested in them since 1st January, 1883 (*k*). Secondly, under the Conveyancing Act, 1881 (*l*), s. 30, upon the death, subsequently to the 31st December, 1881, of a sole trustee or of a last surviving trustee, his fee simple trust estates (being in lands of freehold tenure only, and not in lands of copyhold or customary freehold tenure) (*m*) now descend, whether he die testate or intestate as regards these estates, into his legal personal representative or representatives, and such representative or representatives are thereby declared to be his heirs and assigns within the meaning of all trusts and powers; but as regards his lands of copyhold or customary freehold tenure, the old law as it existed prior to the 31st December, 1881, appears to be again in force (*n*).

We have now touched the principal points in the law of Uses and Trusts, considered as a species of estates; and for the present may dismiss them from our view. With respect to Uses, indeed, there is another aspect under which they will very soon require to be again examined, viz., in their important (but incidental) connection with our system of *conveyances*. But this is a subject which will find a more proper place when we are engaged in the consideration of Title, or the manner in which estates may be acquired or lost.

(*l*) 45 & 46 Vict. c. 75.

(*l*) 44 & 45 Vict. c. 41.

(*k*) As to what is a *bare* trustee, see *Christie v. Ovington*, 1 Ch. D. 279; and *Morgan v. Swansea Urban Sanitary Authority*, 9 Ch. D. 582.

(*m*) 57 & 58 Vict. c. 46, s. 88, replacing 50 & 51 Vict. c. 73, s. 45.

(*n*) *In re Mills' Trust*, 40 Ch. D. 14.

CHAPTER X.

OF TITLE IN GENERAL.



HAVING said thus much of the tenures by which lands are held, and of the estates that may be had in them, we are now, in pursuance of the division before laid down, to consider the *title* to them, or the manner of acquiring and losing estates therein,—a consideration which will extend to equitable as well as to legal estates, but will be principally concerned with the latter; for equitable estates (as we have just seen) are capable of being created or transferred by much simpler methods than those in use at the common law; although, indeed, conveyances of the same kind are commonly used, whether the estate dealt with is legal or equitable; and the rules of *descent* are the same in both (a).

[In treating of the manner in which estates may be acquired and lost, we shall not have occasion to detach the consideration of loss from that of acquisition, for they are reciprocal ideas; by whatever method one man gains an estate, by that same method, or its correlative, some other man at the same time losing it. For where the heir acquires by descent, or the devisee by will, the ancestor or testator has first lost or abandoned his estate by death; where the lord gains land by escheat, the estate of the tenant is first of all lost by the extinction of his hereditary blood; where a man gains an interest by occupancy, the former owner has previously relinquished his right of pos-

(a) *Goodright v. Wells*, Doug. 771.

[session. So, in case of forfeiture, the tenant by his own mistaken view or neglect has renounced his interest in the estate; whereupon it devolves to that person who by law may take advantage of such default.]

The acquisition of an estate in land is sometimes said to be either by *descent* or by *purchase*; and at other times the acquisition is said to be either by the *act of the law* or by the *act of the party* (*b*).

Title by act of *law* expresses all those modes of acquisition, where the law itself casts the right to the estate upon the acquirer, independently of any act or interference of his own, or of any other person for that purpose. Of these the principal kind is title by *descent*; but the term will also properly include title by *escheat*, and also that of tenant by the *curtesy*, and of tenant in *dower* (*c*).

Purchase, on the other hand, though in its vulgar and confined acceptation it is applied only to such acquisitions of land as are obtained by buying it for money or some other valuable consideration (*d*); yet it properly includes every lawful mode of coming to an estate by the act of the party, as opposed to the act of law (*e*): among which, our attention will chiefly be directed to the title by *occupancy*, by *forfeiture*, and by *voluntary transfer*; which last is usually described as that by *alienation* or *conveyance*.

This use of the term *purchase* (*perquisitio*), by which it is distinguished from title by mere act of law, and more particularly from descent, corresponds with that of *conquest* (*conquæstus* or *conquisitio*) in use among the feudists (*f*), and in the law of Scotland (*g*). [And in like manner, the first purchaser (or he who first brought the estate into the family which at present owns it) was styled, among the Norman jurists, the conqueror or *conquereur* (*h*); wherefore, also, William the Norman is called William the Con-

(*b*) Co. Litt. 18 b, n. (2), by Hargrave.

(*c*) Co. Litt. 18 b.

(*d*) 2 Bl. Com. 241.

(*e*) Co. Litt. 18 b.

(*f*) Craig, l. 1, t. 10, s. 13.

(*g*) Dalrymple on Feuds, 10.

(*h*) Gr. Coustum. Gloss. c. 25.

[queror, signifying that he was the first of his family who acquired the crown of England, and from whom therefore all future claims by descent must be derived.]

Among the different titles that have been enumerated, we have already been led incidentally to discuss those of tenant by the curtesy and tenant in dower. At present, therefore, we may confine our attention to *descent*, *escheat*, *occupancy*, *forfeiture*, and *alienation*: the two first being (as has been pointed out) titles by act of law; the three last, titles by purchase.

CHAPTER XI.

OF TITLE BY DESCENT.



WE have seen that an estate of inheritance is, on the death of the owner without having disposed of it during his lifetime, or by will, cast by the law on his heir by a title called *descent*; and we have now to consider the nature of such descent, and the rules by which it is governed (*a*). And in pursuing this subject, we shall pass over descents by particular custom, such as gavelkind and borough-English, and we shall confine ourselves (in the first place at least) to the subject of descent in fee simple, according to the ordinary universal law.

[And first we must remark, with respect to the nature of the heir's title, that no inheritance can vest, nor can any person be the heir of another, till that other is dead; for *nemo est hæres viventis*; and until such death, he can be at the most but an heir *apparent* or heir *presumptive*. An heir apparent is one whose right of inheritance is indefeasible, provided he outlives the ancestor: as the eldest son, who must by the course of the common law be heir to the father whenever the latter happens to die. An heir presumptive is one who, if the ancestor should die immediately, would be his heir; but whose right of inheritance may be defeated by the contingency of some nearer heir being born: as a brother or nephew, whose presumptive succession may be destroyed by the birth of a child; or a daughter, whose present hopes may be hereafter cut off by

(*a*) Co. Litt. 237 a—250 a.

[the birth of a son. Nay, even if the estate hath descended, by the death of the owner, to such brother or nephew, or daughter: in the two former cases the estate shall be divested and taken away by the birth of a posthumous child; and in the latter case, it shall also be totally divested by the birth of a posthumous son (*b*).]

The law of descents is founded for the most part on the custom of the realm; being in point of antiquity referable (as regards some of its rules) to a period at least as early as the reign of Henry the second (*c*); and having attained to a comparatively mature development as early as the reign of Henry the third, or at the latest that of Edward the first (*d*); after which it underwent no change for the space of more than five hundred years, that is to say, until the year 1833, when it was amended in some material respects by the Act of 3 & 4 Will. IV. c. 106, passed “for the amendment of the law of inheritance.”

The rules of descent which were applicable to the case of persons dying before the first day of January, 1834,—rules which are still of occasional importance in the practice of the law,—will be found stated in the foot-note (*e*); but we

(*b*) 2 Bl. Com. 208.

(*c*) This appears from the treatise of Glanville (written about the year 1181), whose account of the law of inheritance comprises all the features of the law of descents prior to 1833.

(*d*) Hale’s Hist. C. L. c. 11; Hist. Eng. Law, by Reeves, vol. i. p. 311; vol. ii. pp. 246, 317.

(*e*) For these old rules, we must refer to the system of Blackstone, according to which the annexed Table of Descent (No. I.) is arranged, and of which the Rules (or Canons) are as follows:—

Rule 1. That inheritances shall lineally descend to the issue of the person who last died actually seised,

in infinitum, but shall never lineally ascend.

Rule 2. That the male issue shall be admitted before the female.

Rule 3. That when there are two or more males in equal degree, the eldest only shall inherit, but the females altogether.

Rule 4. That the lineal descendants in infinitum of any person deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done had he been living.

Rule 5. That, on failure of lineal descendants or issue of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first pur-

need concern ourselves in the text with only those rules or (as they are sometimes called) canons of descent which are applicable to descents (by far the most numerous class of cases) taking place on a death on or after 1st January, 1834, and which rules or canons are as follows:—

I. In every case the descent shall be traced from the purchaser.

This primary law of descent is laid down in the form here propounded by 3 & 4 Will. IV. c. 106, s. 2; and that Act gives its own definition of the sense in which the expression “*the purchaser*” is to be understood—a definition not harmonizing with that of the word *purchase*, as given in the last chapter, but meaning and denoting “the person who last acquired the land otherwise than by descent” (*f*). Wherefore, if the deceased owner of an estate in fee simple came to it by purchase, that is, in any other manner than by descent, the party claiming it as heir must make *him* the *propositus*, or person from whom consanguinity is to be traced; while, on the other hand, if he came to it by descent from some purchasing ancestor, *that ancestor* must be made the *propositus*. Thus, if John Stiles, in the annexed Table of Descent (No. II.), die the owner of an estate, which he acquired by purchase, any person claiming it as heir must prove that he is heir to John Stiles; that is, stands in such relation of con-

chaser, subject to the three last preceding rules.

Rule 6. That the collateral heir of the person last seised must be his next collateral kinsman of the whole blood.

Rule 7. That in collateral inheritances, the male stocks shall be preferred to the female (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from

the blood of the female, however near), unless where the lands have in fact descended from a female.

(*f*) 3 & 4 Will. 4, c. 106, s. 1. The Act says—“Otherwise than “by descent, or than by any *escheat*, “*partition*, or *enclosure*, by the effect “of which the land shall have become part of, or descendible in the “same manner as, other land acquired by descent.”

sanguinity to John Stiles as the laws of descent hereafter laid down make sufficient in the particular case: but if John die owner of an estate which descended to him from Geoffrey his father, by whom it was originally purchased, the claimant must prove that he is heir to Geoffrey the father; who becomes in that case the *propositus* instead of John, the last owner, the effect of which is, that (in the first instance, at least) no relation of John *ex parte maternâ* can, as such, inherit. Again, if the estate descended to John from Lucy Baker, his mother, who was the purchaser, the descent must in that case be traced from *her*; and John's relations *ex parte paternâ* are, on the same principle, necessarily excluded, at least in the first instance. It often happens, however, especially in long descents, that it is uncertain by whom an estate was originally purchased; and against this difficulty of proof the Act of Parliament provides by the following rule of *evidence*, which is to be understood as a necessary supplement to the rule of descent under consideration; viz. that the last owner, or person "last entitled to the land" (*g*), shall be considered to have been the purchaser, unless it shall be proved that he inherited it; and that the same rule shall be constantly applied at every step upwards of the pedigree (*h*). Therefore if John Stiles is the person last entitled to an estate, and dies, and it does not appear whether he purchased it or not, the claimant must prove descent from *him*. So, if he inherited it from his father Geoffrey, but it is unknown whether Geoffrey purchased it or not, the claimant must make himself heir to *Geoffrey*; and, on the same principle, if it can be shown that Geoffrey

(*g*) The expression "the person "*last entitled*," extends "to the last "person who had a right thereto" (*scil.*, to the land), "whether he did "or did not obtain the possession, "or the receipt of the rents and "profits thereof" (3 & 4 Will. 4,

c. 106, s. 1); and the word "land" extends to all hereditaments, whether corporeal or incorporeal, of whatever tenure, and whether in possession, reversion, or remainder, &c. (3 & 4 Will. 4, c. 106, s. 1.)

(*h*) Sect. 2.

took by descent from George, then *George* must be made the *propositus*.

This 1st canon, though newly introduced by the Act of 1833, is mainly founded on the antient maxim, that *none shall claim as heir who is not of the blood of the purchaser* (i), [a maxim which was entirely unknown among the Jews, Greeks, and Romans, none of whose laws looked any further than the last owner of the estate, but in the adoption of which the antient law of Normandy agreed with ours, the law of descent in both being of feudal origin; and this rule or maxim is one which cannot otherwise be accounted for than by recurring to feudal principles (k).

When feuds first began to be hereditary, that is, subject to succession according to consanguinity, it was made a necessary qualification of the heir who would succeed to a feud, that he should be lineally descended from the first feudatory or purchaser (l). In consequence whereof, if a vassal died seised of a feud of his own acquiring, or *feudum novum*, it could not descend to any but his own offspring,—not even to his brother,—because he was not descended, nor derived his blood, from the first acquirer. But if it was *feudum antiquum*, that is, one descended to the vassal from his ancestors, then, on failure of his own descendants, his brother, or such other collateral relation as was descended, or derived his blood, from the first feudatory, might succeed to such inheritance.

To this purpose speaks the following rule: “*frater fratri sine legitimo hærede defuncto, in beneficio quod eorum patris fuit, succedat; sin autem unus e fratribus a domino feudum acceperit, eo defuncto sine legitimo hærede, frater ejus in feudum non succedit*” (m). The true feudal reason for which rule was this, that what was given to a man for his personal

(i) Co. Litt. 12 a; 2 Bl. Com. 220.

(k) Grand Coustum. c. 25.

(l) 1 Feud. 20; Wood v. Douglas, 30 Ch. Div. 327; Moore v. Simkin, 31 Ch. D. 95.

(m) 1 Feud. sect. 2.

[service and personal merit, ought not to descend to any but the heirs of his person ; and therefore, as now in estates tail, (which a proper feud very much resembled,) so in the feudal donation, “*nomen hæredis in primâ investiturâ expressum, tantum ad descendentes ex corpore primi vasalli extenditur, et non ad collaterales, nisi ex corpore primi vasalli sive stipitis descendant*” (n). The will of the donor or original lord, when feuds were turned from life estates into inheritances, not being to make them absolutely hereditary, like the *allodium*, but hereditary only *sub modo* ; not hereditary to the collateral relations or lineal ancestors, or husband or wife of the feudatory, but to the issue descended from his body only.]

Under this system therefore it was necessary that a person claiming by descent on the death of the last proprietor should prove himself not only to be of the blood of, but lineally descended from, the purchaser ; for neither in a *feudum nodum* nor in a *feudum antiquum* were the collateral relations of the purchaser entitled to succeed. However, in process of time, when the feudal rigour was in part abated, a method was invented to let into the inheritance the collateral relations, on failure of the descendants of the grantee, by granting him a *feudum novum* to hold *ut feudum antiquum* ; that is, with all the qualities annexed to a feud derived from his ancestors (o) ; and then though the lineal ancestors themselves were always excluded, for reasons which will hereafter appear, yet the collateral relations of the purchaser,—that is, the descendants of those ancestors,—were admitted to succeed, even *in infinitum*, because they might have derived their blood from the first *imaginary* purchaser. [For since it was not ascertained in such general grants whether this feud should be held *ut feudum paternum* or *feudum avitum*, but merely that it should be held *ut feudum antiquum*, as a feud of indefinite antiquity,—that is, since it was not ascertained from which

(n) Craig, l. 1, tit. 9, sect. 36.

(o) 2 Bl. Com. 221.

[of the ancestors of the real purchaser this feud should be supposed to have descended,—the law would not ascertain it either, but would suppose any of his ancestors *pro re natâ* to have been the first purchaser. And therefore it admitted any of his collateral kindred (who had the other necessary requisites) to the inheritance, because every collateral kinsman must be descended from some one of his lineal ancestors (*p*).]

Of this nature, it is said, were all the feudal grants of fee simple estates in this kingdom (*q*). They were no other than grants of a *feudum novum*, to be held *ut antiquum*, or feud of indefinite antiquity: while, on the other hand, a gift in tail (where none but the lineal descendants of the first donee are admitted) proceeded on the principle of a *feudum strictè novum*.

But while the old feudal requisite of a lineal descent from the real purchaser was thus substantially set aside, it continued nevertheless to be necessary that the claimant should be of his blood; for no person, without being related to him either lineally or collaterally, could be supposed to be lineally descended from the imaginary purchaser. And as it was necessary that the claimant should be of his blood, so it was from him, as a root, that the descent was in some cases to be traced. For if the estate which descended was of a kind in which the owner could not acquire actual seisin of the land, (as in a reversion or remainder expectant upon a freehold, in which case the actual seisin belonged to the particular tenant), the rule was that the claimant must trace his descent from (or, as it was usually expressed, *make himself heir to*,) the purchaser (*r*). Supposing the estate descended, however, to have been of a kind in which the owner *could* acquire

(*p*) *Kynnauld v. Leslie*, Law Rep., 1 C. P. 389.

(*q*) *Wright's Tenures*, 180; 2 Bl. Com. 222.

(*r*) *Ratcliffe's case*, 3 Rep. 42 a; Co. Litt. 15 b, 191 b; *Burton's Compend.* 112; *Doe v. Hutton*, 3 Bos. & Pul. 649, 656.

actual seisin, as in the case of an estate in possession, or a reversion or remainder expectant on a term of years, the rule was different; for here another antient maxim intervened, and required *that the claimant should make himself heir to the person last actually seised of the inheritance* (s); every person who obtained an actual seisin, whether he were an original purchaser, or derived his title by descent, being considered as a new root, from which all future claimants were to spring; a principle that was briefly expressed in the adage *Seisina facit stipitem* (t). Thus if Geoffrey Stiles, the father, died seised of land of which he was the purchaser, and which descended to John as his heir, and John died before entry, the next claimant was to make himself heir to Geoffrey; but if John entered and obtained actual seisin, it would then be necessary to claim as heir not to Geoffrey, but to John; and the difference was material; because the heir to the person last seised and the heir to the purchaser were not necessarily the same person. If John, for example, died leaving a half brother, his father's son, the latter might possibly, on John's decease, be next heir to Geoffrey the father; but it was impossible, as the law then stood, that he should be heir to John, descent not then being allowed between those related by the half blood (u). The rule of which we speak did not make it the less necessary, indeed, that the claimant should be of the *blood* of the purchaser; for this, in every case of descent, was universally required: but if he had that qualification, and could make himself heir to the person last seised, he was entitled to succeed, whether he could make himself heir to the purchaser or not; while, on the other hand, his being heir to the purchaser was not sufficient, unless he was also heir to the person last seised (x). Thus if John Stiles had

(s) Co. Litt. 11 b; Ratcliffe's case, 3 Rep. 41 b, 42 a.

(t) Hale's Hist. C. L. c. 11.

(u) Co. Litt. 15 b.

(x) Hale's Hist. C. L. c. 11.

purchased land and died, leaving no other kindred than his father's brother and his own brother of the half blood, (his father's son), the uncle would have been his heir, as the brother (by the rule already noticed) could not have claimed in that character; and if the uncle had also obtained seisin and died, without other kindred than John's half brother, the latter would then have been entitled to succeed, for he would have been heir to the person last seised, and of the blood of the purchaser, though not the heir of the purchaser (*y*). On the other hand, if John Stiles had inherited land purchased by Geoffrey, and died seised without other kindred than his half brother (his father's son), the latter could not have inherited, because unable to make himself heir to John; and yet he would have been heir to Geoffrey.

It is to be observed, however, that in many cases to trace descent from the person last seised amounted in effect to the same thing as tracing descent from the purchaser. For where the last owner (or person on whose death the succession became vacant) happened to have been in fact the purchaser of the estate, he would also be the person last actually seised. Thus, if it were an estate in possession acquired by feoffment, this implied a real delivery to him of the actual seisin; and supposing it to have been acquired by devise (under the Statute of Wills), or by a conveyance under the Statute of Uses (of the nature of which we shall speak hereafter), the case would be in effect the same; for the actual seisin (so far at least as would suffice to make him the root of descent) would here be transferred to him, without entry, by mere construction of law (*z*). So if his estate were a reversion or remainder in fee expectant on a term for years, he would be clothed with an actual seisin of the fee, through the medium of the possession of the particular tenant. In all such cases,

(*y*) H. Chit. Desc. 115.

Watk. Desc. c. 1, s. 6; Co. Litt.

(*z*) R. v. Sutton, 3 A. & E. 611; 111 a, 266 b.

therefore, if the claimant made himself heir to the purchaser, he would also make himself heir to the person last actually seised; and so would satisfy both the conditions required to make out a descent in fee simple.

The new rule of descent discards in effect the antient maxim *Seisina facit stipitem*, and establishes that descent shall be traced from the purchaser,—a rule simple and uniform, and at the same time easy and certain in its application; while, under the old maxim it was sometimes difficult to determine what would amount to a seisin sufficient to constitute a *stipes*; and it was highly unsatisfactory besides, that the right to the succession should in any case depend on so unimportant a circumstance as the omission of the owner to make entry, before his death, on the land he had acquired by inheritance (*a*).

Before we dismiss this first rule or canon of descent, it is necessary to remark, that where a man devised land to his heir for an estate of precisely the same quality that he would have taken by descent, it was the rule of the common law that the descent would take effect, and not the devise; for the descent was the elder and preferable (as being the more feudal) title (*b*). The contrary rule, however, is now established by the legislature, it being provided by the Inheritance Act (sect. 3), “that when any “land shall have been devised by any testator who shall “die after 31st December, 1833, to the heir, or to the “person who shall be the heir of such testator, such heir “shall be considered to have acquired the same as a “devisee, and not by descent” (*c*); and accordingly such heir will now be the *purchaser* within the definition of that expression in the Act. Again, where land was limited by any assurance to the grantor or feoffor, or to his

(*a*) See *Cooper v. France*, 14 Jur. 214; 19 L. J. (N. S.) *Chanc.* 313; and Lord St. Leonards on Real Property Statutes, p. 282.

(*b*) 2 Bl. Com. 242; 1 Roll. Abr.

626; *Doe v. Timins*, 1 Barn. & Ald. 530.

(*c*) *Bickley v. Bickley*, Law Rep., 4 Eq. 216; *Wood v. Douglas*, 30 Ch. Div. 327.

heirs, or to the right heirs of the testator, the rule of the common law was that such grantor, feoffor, or testator acquired nothing by such assurance, but was entitled as of his former estate (*d*). But the contrary has here also been established by the legislature, it being provided by the Inheritance Act (sect. 3), “that when any land shall “have been limited by any assurance executed after the “31st of December, 1833, to the person or to the heirs “of the person who shall thereby have conveyed the same “land, such person shall be considered to have acquired “the same as a purchaser by virtue of such assurance, “and shall not be considered to be entitled thereto as of “his former estate or part thereof.”

II. The second rule or canon of descent is, that inheritances shall in the first place lineally descend to the issue of the purchaser, in infinitum.

The principle of placing the lineal descendants first in succession to their ancestor is, under all systems of descent, invariably adopted, and may be said to be of universal obligation or propriety. The possessions of the parents naturally go, upon their decease, in the first place to their offspring, as those to whom they have given being, and for whom they are therefore bound to provide (*e*).

III. The third rule or canon of descent is, that the children of the purchaser are preferred to the grandchildren or remoter issue; that, among such children, males are preferred to females; and that an elder male is preferred to a younger; but that females take together.

1. The children of the purchaser are preferred to the grandchildren or remoter issue, because they are nearer to him in blood; accordingly, if any child of the purchaser, living at his decease, has issue also living at the same period, the estate will descend to the child (who is more

nearly related to the purchaser), and not to the grandchild or other descendants, who are more remote.

2. Among the children of the purchaser, males take before females; or, as our law has expressed it, the worthiest of blood shall be preferred (*f*). Thus if John Stiles hath two daughters, Margaret and Charlotte, and afterwards two sons, Matthew and Gilbert, and dies: first Matthew, and (in case of his death without issue) then Gilbert, shall be admitted to the succession, in preference to both the daughters.

[This preference of males to females is entirely agreeable to the law of succession among the Jews (*g*), and also among the Greeks, or at least among the Athenians (*h*); but it was almost totally unknown to the laws of Rome, wherein brethren and sisters were allowed in general to succeed to equal portions of the inheritance (*i*). The preference itself appears with us to have had its source in the feudal law; for though our British ancestors (the Welsh) appear to have given a preference to males (*k*), yet our Danish predecessors who succeeded them seem to have made no distinction of sexes, but to have admitted all the children at once to the inheritance (*l*). But the feudal law of the Saxons on the continent gave preference to the male over the female sex. “*Pater aut mater defuncti, filio non filiæ hæreditatem relinquunt. Qui defunctus non filios sed filias reliquerit, ad eas omnis hæreditas pertineat*” (*m*). It is possible, therefore, that this preference among us was a branch of that imperfect system of feuds which obtained here before the Conquest, especially as it subsists among the customs of gavelkind; and we find that in the laws of King Henry the first, it is plainly recognized (*n*), and the rather as it consisted with the policy of

(*f*) Hale's Hist. Com. Law, c. 11.

(*g*) Numbers, chap. xxvii.

(*h*) Petit. LL. Attic. lib. 6, tit. 6.

(*i*) Inst. iii. 1. 6.

(*k*) Stat. Wall. 12 Edw. 1.

(*l*) Wilkins, Leges Anglo-Sax. LL. Canut. c. 68.

(*m*) Tit. 7, ss. 1 and 4.

(*n*) Leg. Hen. 1, c. 70.

[the feudal law, according to which females could never succeed to a proper feud, being incapable of performing those military services for the sake of which that system was established (*o*). Nevertheless, our law does not extend to the total exclusion of the female, as the Salic law does; but it only postpones them to males; for though daughters are excluded by sons, yet they succeed where there is no son: our law thus steering a middle course between the actual rejection of females and the putting them on a level with males.]

3. Primogeniture obtains among the male children of the purchaser, but not among the female. [As if a man hath two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies; Matthew, his eldest son, shall alone succeed to his estate, in exclusion of Gilbert, the second son, and of both the daughters; but if both the sons die without issue before the father, the daughters, Margaret and Charlotte, shall both inherit the estate as coparceners (*p*).

Primogeniture in males appears to have obtained to some extent among the Jews, in whose constitution the eldest son had a double portion of the inheritance (*q*); and with us, by the laws of King Henry the first, the eldest son had the capital fee or principal feud of his father (*r*); and afterwards the eldest daughter (in the case of female heirs) had the principal mansion (*s*). But, save to the extent aforesaid, the practice rather was, among all nations originally, to divide the lands equally; some among all the children at large, some among the males only; and this practice had the appearance at least of natural justice. But when the emperors began to create honorary feuds or titles of nobility, it was found necessary, in order to preserve their dignity, to make them impartible, or, as they

(*o*) 1 Feud. 8.

(*p*) Litt. s. 5; Hale's Hist. C. L.
c. 11.

(*q*) Selden de Succ. Ebr. c. 5.

(*r*) Leg. Hen. 1, c. 70.

(*s*) Glanv. l. 7, c. 3.

[styled them, *feuda individua*, and in consequence descendible to the eldest son alone (*t*). This example was further enforced by the inconveniences that attended the splitting of estates: namely, the division of the military services, the multitude of infant tenants incapable of performing any duty, the consequential weakening of the strength of the kingdom, and the inducing younger sons to take up with the business or idleness of a country life; instead of being serviceable to themselves and the public, by engaging in mercantile, in military, in civil, or in ecclesiastical employments (*u*). These reasons occasioned an almost total change in the method of feudal inheritances abroad, so that the eldest male began universally to succeed to the whole of the lands, in all military tenures; and in this condition the feudal constitution was established in England by William the Conqueror. Yet we find that socage estates frequently descended to all the sons equally, so late as when Glanville wrote, in the reign of Henry the second (*v*); and it is mentioned in the *Mirroure*, as a part of our antient constitution, that knight's fees should descend to the eldest son, and socage fees should be partible among the male children (*x*). However, in Henry the third's time, we find from Bracton, that socage lands, in imitation of lands in chivalry, had almost entirely fallen into the right of succession by primogeniture, as the law now stands (*y*); except, indeed, in Kent, where they gloried in the preservation of their antient gavelkind tenure, of which a principal branch was the joint inheritance of all the sons (*z*); and except, also, in some particular manors and townships, where their local customs continued their descent, sometimes to the youngest son only, or in other more singular methods of succession.

As to the females, they are still left as they were by the antient law; for being all equally incapable of performing

(*t*) 2 Feud. 55.

(*u*) Hale's Hist. C. L. c. 11.

(*v*) Glanv. l. 7, c. 3.

(*x*) *Mirroure*, c. i. s. 3.

(*y*) Bract. lib. ii. cc. 30, 31.

(*z*) Somner, Gavelkind, 7.

[any personal service, and therefore one main reason for preferring the eldest not applying, such preference would have been injurious to the rest; and the other principal purpose (the prevention of the too minute subdivision of estates) was left to be considered and provided for by the lords, who had the disposal of these heiresses in marriage. However, the succession by primogeniture, even among females, takes place as to the inheritance of the *crown*; wherein the necessity of a sole and determinate succession is as great in the one sex as in the other (*a*). And the right of sole succession, though not of primogeniture, is also established with respect to female dignities and titles of honour. For if a man hold an earldom to him and the heirs of his body, and die, leaving only daughters, the eldest shall not, as a matter of course, be countess, but the dignity is in suspense or abeyance, till the king shall declare his pleasure; for he, being the fountain of honour, may confer it on which of them he pleases (*b*); in which disposition is preserved a strong trace of the antient law of feuds, before their descent by primogeniture even among the males was established; viz. that the lord might bestow them on which of the sons he thought proper; “*progressum est ut ad filios deveniret, in quem scilicet dominus vellet beneficium confirmare*” (*c*).]

IV. The fourth rule or canon of descent is, that the issue of the children of the purchaser *represent* or take the place of their deceased parents *in infinitum*, subject always to the third rule or canon having full operation among them.

[Thus the child, grandchild, or great-grandchild, either male or female, of the eldest son, succeeds before the younger son, and so *in infinitum*; and these representatives shall take neither more nor less, but just so much as their principals would have done (*d*). As if there be

(*a*) Co. Litt. 165 a.

(*b*) Ibid.

(*c*) 1 Feud. 1.

(*d*) Hale's Hist. C. L. c. 11.

[two sisters, Margaret and Charlotte, and Margaret dies, leaving six daughters; and then John Stiles, the father of the two sisters, dies without other issue; these six daughters shall take among them exactly the same as their mother Margaret would have done had she been living,—that is, a moiety of the land of John Stiles, in coparcenary; so that upon partition made, if the land be divided into twelve parts, thereof Charlotte, the surviving sister, shall have six, and her six nieces, the daughters of Margaret, shall have one a-piece.

This taking by representation is called succession *per stirpes*, according to the roots; since all the branches inherit the same share that their root, whom they represent, would have done. And by dividing the inheritance according to the roots or stirpes, the rule of descent is kept uniform and steady; the issue of the eldest son excludes all other pretenders, as the son himself, if living, would have done; but the issue of two daughters divide the inheritance between them, provided their mothers, if living, would have done the same: and among these several issues or representatives of the respective roots, the same preference of males and the same right of primogeniture obtain, as would have obtained at the first among the roots themselves—the sons or daughters of the deceased. As if a man hath two sons, A. and B., and A. dies, leaving two sons, and then the grandfather dies: now the eldest son of A. shall succeed to the whole of his grandfather's estate; and if A. had left only two daughters, they should have succeeded also to equal moieties of the whole, in exclusion of B and his issue. But if a man hath only three daughters, C., D., and E., and C. dies, leaving two sons, D. leaving two daughters, and E. leaving a daughter and a son, who is younger than his sister; here, when the grandfather dies, the eldest son of C. shall succeed to one-third, in exclusion of the younger; the two daughters of D. to another third, in coparcenery; and the son of E. to the remaining third, in exclusion of his elder sister. And

[the same right of representation, guided and restrained by the same rules of descent, prevails downwards *in infinitum*.

Yet this right does not appear to have been thoroughly established in the time of Henry the second, when Glanville wrote: and therefore, in the title to the crown especially, we find frequent contests between the younger (but surviving) brother and his nephew (being the son and representative of the elder deceased), in regard to the inheritance of their common ancestor; for the uncle is certainly nearer of kin to the common stock, by one degree, than the nephew, though the nephew, by representing his father, has in him the right of primogeniture. The uncle also was usually better able to perform the services of the fief, and besides had frequently superior interest and strength to back his pretensions and to crush the right of his nephew. And even in times comparatively modern, we find that proximity of blood occasionally took the place of representative primogeniture, *e.g.* in lower Saxony, where the younger surviving brother was admitted to the inheritance before the son of an elder deceased,—which occasioned the disputes between the two houses of Mecklenburg-Schwerin and Strelitz, in 1692 (*e*). Yet Glanville with us, even in the twelfth century, seems to declare for the right of the nephew by representation; provided the eldest son had not received a provision in lands from his father, or (as the civil law would call it) had not been forisfamiliaried in his lifetime (*f*). King John, however, who kept his nephew Arthur from the throne, by disputing the right of representation, did all in his power to abolish it throughout the realm (*g*); but in the time of his son, King Henry the third, we find the rule indisputably settled in the manner we have here laid it down (*h*).] And thus much for descents to the *issue* of the purchaser.

(*e*) Mod. Un. Hist. xlii. 334.

(*f*) Glanv. l. 7, c. 3.

(*g*) Hale's Hist. C. L. c. 11.

(*h*) Bract. lib. ii. c. 30, s. 2.

V. The fifth rule or canon of descent is, that on failure of the issue of the purchaser, the inheritance shall descend to the nearest lineal ancestor then living in the preferable line;—supposing no issue of a nearer deceased ancestor in that line to exist. And upon this rule, these various points are to be remarked:—

1. After the issue, the next descent is to the lineal ancestor.

This principle, although it appears to have prevailed among the Anglo-Saxons (*i*), has been only recently introduced into the laws of England, which, on failure of descendants of the deceased, would have admitted the descendants of his lineal ancestor (that is, his own collateral heirs), under colour of a fiction formerly explained, but always excluded the lineal ancestor himself: so that the land would rather have escheated to the lord than have ascended to a father or a grandfather (*k*); to illustrate which the inheritance of an estate used to be compared to the descent of a falling body. “*Descendit jus* (says Bracton) *quasi ponderosum quid, cadens deorsum rectâ lineâ; et nunquam re-ascendit eâ viâ quâ descendit*” (*l*), This resulted from the feudal tenure; [for it was an express rule of the feudal law, that “*successionis feudi talis est natura quod ascendentes non succedunt*” (*m*); and we find the same principle recognized in the old law of France (*n*). Our Henry the first indeed, among other restorations of the old Saxon laws, restored the right of succession in the ascending line (*o*); but this soon fell again into disuse; for so early as Glanville’s time we find it laid down as an established law, that *hæreditas nunquam ascendit*, which from that time remained an invariable

(*i*) Hallam’s Middle Ages, vol. ii. p. 467, 7th ed., citing Leges Hen. 1, c. 70.

(*k*) Litt. s. 3.

(*l*) Bract. lib. ii. c. 29; Coleridge’s Blackstone, vol. ii. p. 212, n.

(*m*) 2 Feud. 50.

(*n*) Domat. part 2, lib. 2; Montesq. Esp. des Lois, lib. 31, c. 33.

(*o*) LL. Hen. 1, c. 70; Blackborough v. Davis, 1 P. Wms. 40.

[*maxim (p)* ; and the maxim was not in itself unreasonable. For if the feud of which the son died seised was really *feudum antiquum*, or one descended to him from his ancestors, the father could not possibly succeed to it, because it must have passed through him in the course of its descent to the son ; unless indeed it were *feudum maternum*, or one descended from his mother, and then the father would have been excluded by the feudal maxim already considered, as he did not derive his blood from the purchaser. And if it were *feudum novum*, or one newly acquired by the son, the father would still be excluded by the same maxim : which was founded not only upon the personal merit of the vassal which might be transmitted to his children, but also upon this consideration of military policy, that the decrepit grandsire of a vigorous vassal would be but indifferently qualified to succeed him in his feudal services. Nay, even if this *feudum novum* were held by the son *ut feudum antiquum*, such a feud must in all respects have descended as if it had been really an antient feud ; and therefore could not go to the father, because if it had been an antient feud, the father must have been dead before it could have come to the son. Thus, whether the feud were strictly *novum*, or strictly *antiquum*, or *novum ut antiquum*, in none of these cases could the father possibly succeed (*q*).] Such at least have been alleged, (and apparently with truth,) as the reasons of the rule which excluded the ascending line (*r*). The reasoning, however, was not consistently applied : for the elder brother should, upon the same principles, never have been heir to the younger, nor the father's eldest brother have been heir to his nephew ; and yet a succession in both these collateral lines was always permitted by law (*s*) ; and the rule was felt, in later times, to be opposed to natural justice, which seemed to dictate that a man's

(*p*) Glanv. (temp. Hen. 2), lib. 7,
c. 1.

(*q*) 2 Bl. Com. 212.

(*r*) Co. Litt. by Harg. 11 a, n. (l).

(*s*) Bl. Com. ubi sup.

progenitors should be allowed to inherit his estate, by a right second only to that of his posterity ; and such accordingly is now the rule ; for by the Inheritance Act, 3 & 4 Will. IV. c. 106, it is provided, “ that every lineal ancestor shall be “ capable of being heir to any of his issue ; and in every “ case where there shall be no issue of the purchaser, his “ nearest lineal ancestor shall be his heir, in preference to “ any person who would have been entitled to inherit, “ either by tracing his descent through such lineal an- “ cestor, or in consequence of there being no descendant “ of such lineal ancestor (*t*) : so that the father shall be “ preferred to a brother or sister, and a more remote lineal “ ancestor to any of his issue other than a nearer lineal “ ancestor or his issue ” (*u*).

2. The descent is to the nearest living ancestor in the preferable line.

How the preference is to be settled between two different lines of ancestry, will appear by the next rule. But in the meantime we are to observe, that in the same line the nearest of blood has the precedency.

Thus, if on failure of the issue of John Stiles, we proceed to inquire for his heir, among his lineal ancestors, we are to prefer Geoffrey Stiles, his father, to George, his grandfather (supposing both to be living) ; and so we are to prefer Lucy, his mother, to Esther, his maternal grandmother (*x*).

This branch of the rule, though in a direct sense also resting on the same positive enactment, is not, like the other, new in its *principle*, but agrees in substance with the law as it stood prior to the Inheritance Act. For though the lineal ancestors were not themselves permitted to succeed, yet they were always regarded as the fountains

(*t*) The expression “ *descendants* ” extends to all persons who trace their descent through an ancestor (3 & 4 Will. 4, c. 106, s. 1) ; in other words, this fifth

rule or canon is read subject always, and at every step, to the first four rules or canons.

(*u*) Sect. 6.

(*x*) Table of Descent (No. II.).

of inheritable blood, and the stocks from which the next succession must spring, so that their issue were admitted, in right of descent from *them*, to the inheritance (*y*) ; and as to their issue, the rule was, that the descendants of a nearer lineal ancestor, in the preferable line, were preferred to those of one more remote (*z*). Very similar to which, as Blackstone observes, was the law of inheritance among the antient Germans our progenitors, "*hæredes successorésque sui cuique liberi, si nullum testamentum : si liberi non sunt, proximus gradus in possessione, fratres, patrui, avunculi*" (*a*).

3. The rule applies only in the event of the issue of every nearer deceased ancestor in the same line being extinct. For if the issue of any such ancestor exist, the order of succession is governed, as we shall see hereafter, by a different rule.

VI. The sixth rule or canon of descent is, that, among the lineal ancestors of the purchaser, the paternal line (whether of the purchaser, or of any ancestor, male or female,) is always preferred to the maternal.

Therefore Geoffrey, the father, in the annexed Table of Descent, (No. II.,) will succeed rather than Lucy, the mother ; and if Geoffrey be dead, any of his male ancestors, George, Walter, and Richard (according to their proximity) will have the preference to any of his maternal ancestors, or to the maternal ancestors of George, or Walter respectively ; though, on the other hand, all these maternal ancestors will take precedence of Lucy, the mother, or any ancestor of hers. Upon the same principle, when upon failure of the male line of John's paternal ancestry, by the extinction of the blood of Richard, we inquire for the next heir—we are to select Ann Godfrey, the mother of the more remote male

(*y*) 2 Bl. Com. 226.

(*z*) Ibid.

(*a*) Ibid. citing Tacitus de Mor. Germ. 21.

paternal ancestor, in preference to Christian Smith, the mother of a male paternal ancestor less remote; for if we were to give the preference to Christian, we should be resorting to the maternal line of George, instead of his paternal, which would be contrary to our rule.

This preference of the paternal line is founded on the express enactment of the Inheritance Act (3 & 4 Will. IV. c. 106); which provides (by sect. 7), “that none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting, until all his paternal ancestors and their descendants shall have failed (*b*); and also that no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and that no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed;” and which further provides (by section 8), “that where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person in preference to the mother of a less remote male paternal ancestor, or her descendants; and where there shall be a failure of male maternal ancestors of such person, and their descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person in preference to the mother of a less remote male maternal ancestor, and her descendants.”

The first of these two sections (viz., sect. 7) (it may be observed) is a mere adoption of the principle of the former law, under which the blood of the paternal ancestor was

(*b*) *Greaves v. Greenwood*, 2 Ex. D. 289.

preferred to that of the maternal; and the blood of the male paternal ancestor to that of the female paternal; and the blood of the male maternal to that of the female maternal (*c*). The feudal maxim, it will be remembered, was that the heir must in all cases derive his blood, that is, be lineally descended, from the purchaser; but where the purchaser's estate was in fee simple, his collateral relations were (as we have seen) let in by the aid of a fiction, which supposed the feud to be of indefinite antiquity; in other words, which supposed the feud to have descended upon the purchaser from some remote supposititious ancestor; and upon the basis of that fiction the collaterals of the last tenant, *ex parte paternâ*, would be more probably of the blood of this supposititious purchaser than those *ex parte maternâ*; because the estate presumably came to the last tenant through his male rather than through his female progenitors. The second of the two sections in question (*viz.*, sect. 8) settled a question which had formerly been the subject of much dispute, namely, whether the issue of the paternal grandfather's maternal grandfather, or the issue of the paternal grandmother's father, were the true heir of the purchaser. According to many old authorities, including Lord Bacon and Sir Matthew Hale, the latter had the better claim, it being held by these writers (in conformity with a more antient opinion), that all the female ancestors, on the part of the father, were equally worthy of blood, and that in that case *proximity* should prevail (*d*). Blackstone, however, dissented from that doctrine (*e*); and his view (which is the one adopted by the Inheritance Act) appears to be, on the feudal principles above expounded, the more correct one; for, reverting to the fiction by which collaterals were introduced into the succession, as we are led by a chain of successive presumptions to suppose the estate of John

(*c*) 2 Bl. Com. 234.

(*d*) Bac. Elem. c. 1.

(*e*) 2 Bl. Com. 238; *Davies v. Lowndes*, 5 Bing. N. C. 169.

Stiles, in the annexed Table of Descent (No. II.), to have descended from his father Geoffrey, rather than from his mother Lucy, and from his grandfather George Stiles, rather than from his grandmother Cecilia Kempe; so, if it did not descend to George, from Walter his father, the next presumption would be, that it descended from his mother Christian Smith, who again would presumably derive it from her father William; so that the issue of William Smith, the paternal grandfather's maternal grandfather, would necessarily have a better title than the issue of Luke Kempe, the paternal grandmother's father.

VII. The seventh rule or canon of descent is, that where an ancestor, to whom, if living at the purchaser's death, the inheritance would, according to the fifth rule, descend, dies before the purchaser, leaving issue, the issue of such ancestor *in infinitum* shall represent him, according to the same law of succession laid down with respect to the issue of the purchaser; but with this addition, that those related by the whole blood to the purchaser, are preferred to those related by the half-blood.

It is obvious from the nature of consanguinity, that, as regards the purchaser, the issue of his lineal ancestor are necessarily his collateral kindred; and on the subject of collateral inheritance (which this rule or canon first introduces us to), it deserves remark, in the first place, that the right of collaterals no longer depends on the fiction of the *feudum novum ut feudum antiquum*, but on the positive enactment of the Inheritance Act (*f*); so that now an estate purchased in fee simple need no longer be considered as granted to hold *ut feudum antiquum*, but rather as a new feud, with inheritable properties different from those which attached to a new feud under the antient system, *scil.*, being descendible not only to those who derive their

(*f*) 3 & 4 Will. 4, c. 106, ss. 7, 8.

blood from the purchaser, but to those also from whom he derives his, and to their descendants. And this second point is to be remarked, regarding collateral inheritance, namely, that the right of collaterals is now referable universally to that of the ancestor from whom they descend, and only through him can they ever be considered as heirs to the purchaser; so that the old law, which held that between brothers and sisters the descent was to be considered, for some purposes, as *immediate* (*g*), is now exploded, the Inheritance Act having now expressly provided that no brother or sister shall be considered to inherit immediately from his or her brother or sister, but that every descent from a brother or sister shall be traced through the parent (*h*).

And now reverting to the rule under consideration,—

First, the issue of the purchaser's lineal ancestor represent him *in infinitum*; and that according to the same law of succession as prevails among the issue of the purchaser.

Thus, if John Stiles, in the annexed Table of Descent (No. II.), purchases land, and dies entitled to the same, without issue, and his father Geoffrey be dead, it descends to Francis (the eldest son of Geoffrey, and the brother of John), rather than to George the grandfather; or if Francis be also dead, leaving several children, then to the eldest son of Francis, the nephew of John, and does not pass to any remoter ancestor of John, unless the issue of Geoffrey are exhausted. So, it will descend to a son, or even a *daughter* of Francis (if he left no son), rather than to Oliver Stiles, the brother of John; for such son or daughter represents the father, who, as the eldest son of Geoffrey, represented *him*.

Secondly, collaterals of the whole blood are preferred to collaterals of the half-blood.

(*g*) 2 Bl. Com. 226; Watk. Desc. Rep., 1 C. P. 389.
111, n.; Kynnaired v. Leslie, Law

(*h*) 3 & 4 Will. 4, c. 106, s. 5.

[A kinsman of the whole blood, is he that is derived, not only from the same ancestor, but from the same couple of ancestors. For every man's blood is compounded of the bloods of his respective ancestors; and he only is of the whole or entire blood with another, who hath, so far as the distance of degrees will permit, all the same ingredients in the composition of his blood, that the other hath. Thus, the blood of John Stiles being composed of those of Geoffrey Stiles his father and Lucy Baker his mother, therefore his brother Francis, being descended from both the same parents, has entirely the same blood with John Stiles, that is to say, he is his brother of the whole blood (*i*). But if, after the death of Geoffrey, Lucy Baker the mother marries a second husband, Lewis Gay, and hath issue by him, the blood of this issue, being compounded of the blood of Lucy Baker (it is true) on the one part, but that of Lewis Gay instead of Geoffrey Stiles on the other part, it hath therefore only half the same ingredients with that of John Stiles, so that he is only his brother of the half-blood.] So also if the father has two sons, A. and B., by different wives (or, according to the technical expression, by different venters), now these brethren are not brethren of the whole blood, but of the half-blood only.

The Inheritance Act assigns to such of the purchaser's collateral kinsmen as are of the whole blood, and their issue, the preference to those who are of the half-blood only, in the same degree, but admits the latter to the next place in the succession (*k*). Thus if the father have a son A., by one wife,—and two sons, B. and C., and a daughter, by a second wife,—and B. purchase land, and die without issue, and the father be also dead, C., the younger brother, or, on failure of C. and his issue, the sister, shall succeed in preference to A., the elder brother. But the latter (though only of the half-blood) and his issue, will succeed in preference to any collateral relation

(*i*) Table of Descent (No. II.)(*k*) 3 & 4 Will. 4, c. 106, s. 9.

not descended from B.'s father, though of the whole blood with B. So on the death of John Stiles the purchaser, in the annexed Table (No. II.), without issue, his father Geoffrey being also dead, he will be succeeded, not only by his elder brother Francis, or his second brother Oliver, but even by his sisters Bridget and Alice, in preference to his half-brother, the son of his mother Lucy and Lewis Gay, who cannot indeed inherit until the paternal line are exhausted; for his mother, whom he represents, could not (by the sixth rule) have taken while any of the paternal line remained. But the son of Lucy and Lewis Gay (and his issue after him) will stand next to his mother, in the order of succession, and in preference to any other collateral relation of John Stiles *ex parte maternâ*, though of the whole blood with John Stiles.

In the admission of the half-blood, the Inheritance Act has introduced a new principle of inheritance; for, as the law before stood, the half-blood (like the lineal ancestor) were totally excluded, and the land would rather have escheated to the lord than have gone to any kinsman (however near) of the half-blood. Nay, even when a father died, and his lands descended to his eldest son A., who entered thereon, and died seised without issue, still B., the son of the same father by another wife, could not have been heir to these lands, because he was only of the half-blood to A., the person last seised; but they would have descended to a sister (if any) of the whole blood to A., for in such cases the old maxim applied, that *possessio fratris facit sororem esse hæredem*. Yet if A. had died without entry, then B. might have inherited; not as heir to A. his half-brother, but as heir to their common father, who was the person last actually seised (*l*).

This exclusion of the half-blood was a feature almost peculiar to the law of England; and it rested entirely upon, and was in fact auxiliary to, that principle of the feudal

law, which required the heir to derive his blood from the purchaser,—which a kinsman of the half-blood did not do, or at all events did not so certainly do as a kinsman of the whole blood.

To illustrate this by example (*m*):—Let there be John Stiles and his brother Francis, by the same father and mother, and another brother born of the same mother by Lewis Gay, a different father. Now if John die seised of lands, but it is uncertain whether they descended to him from his father or mother, in this case his brother Francis of the whole blood is sure to be in the line of descent from the first purchaser, whether it were the line of the father or of the mother. But his half-brother by Lewis Gay is to the full as likely not to be descended from the original purchaser as to be descended from him, and there is consequently no reasonable presumption of his having derived his blood from the original purchaser at all; therefore the antient rule (which was itself founded on a fiction) proceeded upon this uncertainty to disinherit altogether a kinsman who was only of the half-blood; for there was no fair reason to believe that such a kinsman had in him the blood of the supposititious first purchaser (*n*). The antient law, in this respect, appears to have overlooked the fact, that a kinsman of the half-blood to the deceased, supposing him to have derived the estate from some unknown ancestor, would in some instances have the same chance of being descended from that ancestor as a kinsman of the whole blood in a remoter degree, and in other instances a much greater. Thus a brother of the half-blood would have the same chance as an uncle of the whole, on the same side, and more than a great uncle; and yet, in these instances, the remoter kinsman was always admissible, while the nearer was incompetent to succeed. The antient law excluding the half-blood operated with especial

(*m*) 2 Bl. Com. 228.

(*n*) 2 Bl. Com. 231, note by Christian.

severity in this respect, namely, that it applied even where the deceased tenant did not take by purchase, but by descent, and had a relative of the half-blood known to be descended as well as himself from the purchaser;—as in the case already noticed, where upon the death of A. without issue, seised of lands which had descended to him from his father, his half-brother B., son of the same father, was debarred from the inheritance,—a severity which may have been the logical, but certainly it was an extreme, result of the feudal principle, and which (the better opinion seems to be) was not originally involved in that principle at all. [For originally the custom of excluding the half-blood, in Normandy, extended only to exclude a *frater uterinus* where the inheritance descended *a patre*, and *vice versâ*; and in England it appears to have remained a doubt in the time of Bracton and of Fleta, whether the half-blood on the father's side was excluded from the inheritance which originally descended from the common father, or only from such as descended from the respective mothers, and from newly-purchased lands; and the rule, as laid down by Fortescue, extends no further than this, *frater fratri uterino non succedet in hæreditate paternâ* (o). It is moreover worthy of observation that the crown has always been held capable of descending to the half-blood of the preceding sovereign (p), provided he be the blood of the first monarch of the reigning family who was *conqueror* (which in feudal language is the same as *purchaser*) of the realm. Thus it actually did descend from King Edward the sixth to Queen Mary, and from her to Queen Elizabeth, who were respectively of the half-blood to each other.] For though none can be a claimant to the crown unless known to be descended from the original stock—which was at one period King William the Norman, and is now, by Act of Parliament (12 & 13 Will. III.

(o) Fort. De Laud. Leg. Ang. (p) Plowd. 245; Co. Litt. 15 b. c. 5.

c. 3), the Princess Sophia of Hanover (*q*)—yet, when such descent is known, the feudal rule is satisfied, whether he be related to the last sovereign by the whole, or by the half-blood. And upon the same principle, in titles of honour (*r*) and in all estates tail (*s*), half-blood was never an impediment to the descent; because, in these cases, the pedigree from the first donee must be strictly proved: and the feudal maxim is consequently carried into effect, without resorting to any auxiliary rule. And now, by the Inheritance Act, it has been provided (as regards fee simple inheritances generally):—"That any person related
 "to the person from whom the descent is to be traced by
 "the half-blood shall be capable of being his heir; and the
 "place in which such relation by the half-blood shall stand
 "in the order of inheritance, so as to be entitled to inherit,
 "shall be next after any relation in the same degree of
 "the whole blood and his issue, where the common ancestor shall be a male; and next after the common ancestor,
 "where such common ancestor shall be a female; so that
 "the brother of the half-blood on the part of the father
 "shall inherit next after the sisters of the whole blood on
 "the part of the father and their issue; and the brother
 "of the half-blood on the part of the mother shall inherit
 "next after the mother" (*t*).

Having now stated and illustrated all the rules or canons of descent, we have now to consider some few rare and exceptional cases, formerly referred to as requiring a separate consideration.

First, then, there are cases in which a man may acquire land by purchase, under a limitation to the "heirs," or to the "heirs of the body," of one of his ancestors. Thus, if the owner of lands conveys them to A. for life, remainder to the "heirs" or "heirs of the body" of B., and B. be

(*q*) 2 Bl. Com. 233.

(*r*) Co. Litt. 15.

(*s*) Litt. ss. 14, 15 b.

(*t*) 3 & 4 Will. 4, c. 106, s. 9.

then deceased, or be then living but die during the continuance of the particular estate, the person who at the time of the conveyance in the first case, or at the time of B.'s death in the second, answers the description of his "heir" or "heir of his body," will, by the rule of the common law, take the remainder as purchaser, and his estate will be a fee simple or fee tail, as the case may be; for such words amount *not only to a description of the grantee, but to a limitation of the estate* which he is to take^(u). But the estate so acquired by purchase is anomalous as regards its descendible quality; for by the 4th section of the Inheritance Act, it is provided that (in effect) the ancestor named in the limitation shall be deemed the purchaser, *scil.*, for the purposes of the subsequent descent of the estate thereby limited; and this rule applies to all assurances *inter vivos* executed after the 31st December, 1833, and to all assurances by will, where the testator departs this life after the 31st December, 1833, in all respects "*as if the ancestor named in such limitation had been the purchaser.*"

Secondly, it is provided by the statute 22 & 23 Vict. c. 35, s. 19, that "Where there shall be a total failure of heirs of the purchaser (or where any land shall be descendible as if an ancestor had been the purchaser thereof, and there shall be a total failure of the heirs of such ancestor), then and in every such case the land shall descend, and the descent shall thenceforth be traced from *the person last entitled to the land as if he had been the purchaser thereof.*" That is to say, the purchaser who is defined in the first rule or canon of descent as being *the last person entitled to the land who did not inherit* the same, is by this rule or canon defined as *the last person entitled to the land*, although he was entitled thereto by descent or as by descent; and it is to be observed that, subject only to that one change in the *propositus*, all the preceding seven

(u) Co. Litt. 10 a, 319 b; 1 Roll. Abr. 627; 2 Bl. Com. 241; 1 Prest. Est. 280, 452, 453.

rules or canons are (in such a case) to be applied over again, for the purpose of discovering the heir; and in this way, the widow of the purchaser proper and her family may be found to be the heir.

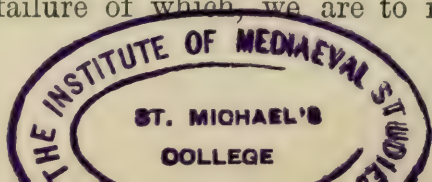
Having now brought our account of the present law of descent to a close, we may remark, as the result of the investigation, that, upon the death of the owner of an estate in fee simple, we are to ascertain the heir, by considering, first, who was the purchaser; and we are then to look for the heir, first, among his issue,—where the heir will be his descendant next to him in blood, but subject to the principles which obtain as to sex, primogeniture, and representation: and, failing his issue, among his lineal ancestors or their issue,—where the heir will be his lineal ancestor next in blood in the preferable line, or the issue of such ancestor, if deceased, the principle which prefers the whole to the half-blood being also at each step regarded; and then, on the total failure of any heir of the purchaser proper, the person last entitled (although entitled himself by inheritance) is to be deemed the purchaser and the like investigation on that basis is to be repeated through all its successive stages.

Before we conclude this branch of our inquiries, it may not be amiss to *apply* the rules more particularly, and to supply the reader with a short sketch of the manner in which we must search for the heir of a person,—as John Stiles,—who dies entitled to land, of which he was the purchaser or *quasi* purchaser.

In the first place succeeds the eldest son, Matthew Stiles, or his issue, No. 1 (*x*). If he and his heirs be extinct, then Gilbert Stiles, and the other sons respectively in order of birth, and their issue, No. 2. In default of these, all the daughters together, Margaret and Charlotte Stiles, or their issue, No. 3. On failure of the descendants of John Stiles, his father Geoffrey (being his nearest lineal

(*x*) Table of Descent (No. II.).

ancestor in the preferable line) is admitted, No. 4. Then the issue of his father, viz., first, Francis Stiles, the eldest brother of the whole blood, or his issue, No. 5; then Oliver Stiles and the other whole brothers respectively, in order of birth, or their issue, No. 6; then the sisters of the whole blood all together, Bridget and Alice Stiles, or their issue, No. 7; then the son of Geoffrey (the paternal brother of the half-blood), No. 8, or his issue; and the paternal sisters of the half-blood, No. 9, or their issue. In default of them, George Stiles, the paternal grandfather, is admitted, No. 10, and then his issue, viz., first, his issue of the whole blood with John, No. 11, then his issue of the half-blood with John, No. 12. In default of these, Walter Stiles, the paternal grandfather's father, is admitted, No. 13. Then the issue of Walter, viz., first, his issue of the whole blood with John, No. 14, then his issue of the half-blood, No. 15. In default of these, Richard Stiles, the paternal grandfather's paternal grandfather, is admitted, No. 16, or his issue, No. 17, and so on, in the paternal line of Walter Stiles, *in infinitum*. On failure of this line (this is supposing the decease of Richard, and of all his maternal and paternal ancestors, and the failure of their issue both of the whole and of the half-blood), we are next to resort to the maternal line of Walter Stiles, rather than of a nearer male ancestor; and the paternal grandfather's paternal grandmother, Ann Godfrey (according to the maiden name), No. 18, will consequently be the person next entitled to succeed, and so on in the maternal line of Walter Stiles, *in infinitum*. On failure of which, we are to resort to the maternal line of George Stiles; and the paternal grandfather's mother, Christian Smith, No. 19, will be the person next entitled, and then her issue of the half-blood to John, No. 20. Then the paternal grandfather's maternal grandfather, William Smith, No. 21; and then his issue, No. 22; and so on in the paternal line of Christian Smith, *in infinitum*. On failure of which, we are to resort to her



maternal line; and the paternal grandfather's maternal grandmother, Jane King, No. 23, will be the person next entitled, and so on in the maternal line of Christian Smith, *in infinitum*. On failure of which, we are to resort to the maternal line of Geoffrey Stiles; and the paternal grandmother, Cecilia Kempe, No. 24, will be the person next entitled; and then her issue of the half-blood to John, No. 25. Then the paternal grandmother's father, Luke Kempe, No. 26; then his issue of the whole blood to John, No. 27. Then his issue of the half-blood to John, No. 28. Then the paternal grandmother's paternal grandfather, Thomas Kempe, No. 29. Then his issue No. 30, and so on in the paternal line of Luke Kempe, *in infinitum*. On failure of which, we are to resort to his maternal line; and the paternal grandmother's paternal grandmother, Sarah Browne, No. 31, will be the person next entitled; and so on in the maternal line of Luke Kempe, *in infinitum*. On failure of which, we are to resort to the maternal line of Cecilia Kempe; and the paternal grandmother's mother, Frances Holland, No. 32, will be the person next entitled. Then her issue of the half-blood to John, No. 33. Then the paternal grandmother's maternal grandfather, Charles Holland, No. 34, then his issue, No. 35; and so on in the paternal line of Frances Holland, *in infinitum*. On failure of which, we are to resort to the maternal line of Frances Holland; and the paternal grandmother's maternal grandmother, Mary Wilson, No. 36, will be the person next entitled; and so on in the maternal line of Frances Holland, *in infinitum*. On failure of which, the paternal blood of John Stiles entirely failing, recourse must then, and not before, be had to his maternal relations, or the blood of the Bakers, Nos. 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47; the Bates's, No. 48; the Willes's, Nos. 49, 50, 51, 52; the Carters, No. 53; the Thorpes, Nos. 54, 55, 56, 57, 58, 59, 60; the Bishops, No. 61; the Whites, Nos. 62, 63, 64, 65; and

the Wards, No. 66, in the same regular successive order as in the paternal line.

Before we conclude the chapter, it will also be proper to notice some miscellaneous points of law connected with the title which is by descent (*y*).

1. In order to make the title complete, where the estate descended is one in possession, the heir is required to make *entry* on the land; for until then he is said to have seisin in *law* only and not in *deed*; and is incompetent to bring any action of trespass *quare clausum fregit* for injuries committed to the land (*z*). If the estate be one in expectancy, he has of course no right of entry until the particular interest determines: but if it be a reversion or remainder immediately expectant on an estate for *years*, the possession of the particular tenant operates, upon a principle before explained, as that of the heir or remainderman or reversioner; whose seisin is in that case considered as a seisin in deed, and not in law only (*a*).

2. As regards the phrase “*breaking the descent*,”—it is to be observed that where a man acquires lands by descent, they retain the inheritable quality which they had in the purchaser or *propositus*; wherefore a paternal inheritance never passes over to the maternal heirs of the person last entitled; nor will a maternal inheritance pass over to the paternal heirs of such person. And in this respect the title by descent differs remarkably from that by purchase; for by the latter the estate acquires a new inheritable quality, and is descendible to the owner’s blood in general, that is, first to those of the paternal, and then to those of the maternal line. It follows, that if a person who has acquired an estate by descent conveys it to a new purchaser,

(*y*) Regarding the arbitrary descents of trust estates under certain modern statutes, see pp. 363, 364, *supra*.

(*z*) Bac. Ab. Trespass (C.).

(*a*) Co. Litt. 15 a; Doe *v.* Keen, 7 T. R. 390; Doe *v.* Whichelo, 8 T. R. 213; Leach *v.* Jay, 9 Ch. D. 426.

the line of descent is *broken* ; and even if that purchaser conveys it back again to him, the interruption still continues ; for the former owner will then hold it as by purchase, and not as by descent, and will therefore be able to transmit it to his heirs on either the paternal or the maternal side. Thus, if a man seised of lands as heir on the part of his mother (and which consequently no relation on the father's side can, as such, inherit), conveys them to another, and afterwards obtains a reconveyance of them, to hold to him and his heirs, and then dies without issue, his heirs on the part of his father shall inherit, and in preference to those on the mother's side (*b*). But a mere alteration in the quality or circumstances of an estate will not break the descent ; and therefore, if parceners make partition of their land, they are still *in* of their respective shares by inheritance, though those shares are no longer held in coparcenary, but in severalty.

3. An estate in fee simple descending on the heir, comes to him charged with the debts of the ancestor from whom it descended (*c*). This liability has always been recognized in respect of such of the ancestor's obligations as (in legal language) have accrued by *specialty*, a term which includes an obligation accruing by "matter of record" (such as a judgment or other proceeding recorded in a court of justice) as well as an obligation arising on a deed, *i.e.*, a contract under seal ; though, unless the ancestor bound his heirs *eo nomine*, their liability was not held to be such as could be enforced in the courts of *law* (*d*). And the heir is not liable (whatever the kind of obligation of his ancestor may have been) to be charged as of his own proper debt ; but only so far as he has taken, in his character of heir, an estate sufficient to satisfy the debt ; which suffi-

(*b*) Co. Litt. 12 b ; Doe v. Morgan, 7 T. R. 105 ; 1 Prest. Est. 420, 458, 459 ; Wood v. Douglas, 28 Ch. Div. 327 ; Moore v. Simkin, 31 Ch.

Div. 95.

(*c*) Bushby v. Dixon, 3 Barn. & Cress. 298.

(*d*) Harbert's case, 3 Rep. 12 b.

cient estate is called, in law, assets, from the French word *assez*, enough (*e*). But the assets which descend to an heir may consist either of legal or of equitable estate; and though equitable interests were not in general noticed at law, yet in this case it was otherwise: for by the Statute of Frauds (29 Car. II. c. 3), s. 10, if any *cestui que trust* shall die, leaving a trust in fee simple to descend to his heir, the trust shall be assets by descent, and the heir liable to be charged with the obligation of his ancestor by reason of such assets, as if the *legal* estate had descended in possession upon him.

But though the *heir* was thus subject to liability for the specialty debts of his ancestor (to the extent of the estate inherited), no such liability at one time attached to a *devisee*; and therefore, to protect creditors from such devises as might tend to their prejudice, it was provided by statute 3 William and Mary, c. 14, called "The Statute of Fraudulent Devises," that where a deceased person had devised any real estate, without making it subject to the payment of his debts, his devisee should be liable to be charged in respect of the real estate so devised, in the same manner as, and jointly with, the heir: and a creditor, bringing an action for that purpose, should be entitled either to make the devisee a joint defendant with the heir, or to sue the devisee alone, where there was no heir liable (*f*).

Still, however, no remedy existed against the real estate of a deceased person (whether in the hands of an heir or devisee), for creditors claiming upon *simple contract* (*i.e.*, not under deed), or claiming under deeds in which the heirs were not expressly bound; but this is no longer the case; for the claims of creditors of every class have now been effectually secured through the medium of proceed-

(*e*) 2 Bl. Com. 243, 244; 2 Saund. by Wms. 7, n. (4).

(*f*) *Hunting v. Sheldrake*, 9 Mee.

& W. 256; *Coope v. Cresswell*, Law Rep., 2 Eq. Ca. 106; 2 Ch. App. 112; Order xvi. rule 45 (1883).

ings in *equity*. At first, this equitable redress was confined to cases where the deceased was a person carrying on trade within the meaning of the bankrupt laws, it being provided by 47 Geo. III. sess. 2, c. 74, and afterwards by 11 Geo. IV. & 1 Will. IV. c. 47 (*g*), that, in such a case, the creditors by simple contract should be entitled by proceedings in equity, in such manner as therein mentioned, to enforce payment out of the real estate descending on his heir, or devised by his will,—and not made subject to the payment of his debts. Subsequently, however, by 3 & 4 Will. IV. c. 104, it was enacted more extensively—that when *any* person should die entitled to any real estate, not by his will made subject to his debts, such estate should be considered as assets to be administered in equity, for payment of his debts as well on simple contract as on specialty; but the last mentioned Act still gave a priority to those who in their lifetime had placed their claims upon a basis of stronger obligation, for it provided, that, in the administration of the assets in equity, all creditors by specialty in which the heirs were bound *eo nomine*, should be paid in full before any creditors by simple contract, or claiming on specialties in which the heirs were not so bound. However, by Hinde Palmer's Act (32 & 33 Viet. c. 46), in the administration of the estate of any person who shall die on or after 1st January, 1870, no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by an instrument under seal, or is otherwise made a specialty debt; but that all his creditors, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of his assets, whether they be legal or equitable; but, of course, this enactment does not prejudice any lien, charge or other security which any creditor may hold for his debt (*h*).

(*g*) *Small v. Hedgeley*, 34 Ch. Div. 379.

Rep., 15 Eq. Ca. 270; *Shirreff v. Hastings*, 6 Ch. D. 610.

(*h*) *Williams v. Williams*, Law

And by the Judicature Act, 1875 (*i*), s. 10, as from the 2nd November, 1875, in the administration of the estates of deceased insolvents, the like rules shall prevail as in bankruptcy, as regards the mode of proof by secured and unsecured creditors, and as to the classes of debts and kinds of liability that are provable, and as to the valuation of annuities and contingent liabilities (*k*). Also, where an estate is insolvent, the administration thereof after death may be wholly in bankruptcy; or may (for good cause) be transferred from the Chancery Division into the Bankruptcy Division of the Court (*l*).

(*i*) 38 & 39 Vict. c. 77.

(*k*) In re Maggi, *Winehouse v. Winehouse*, 20 Ch. D. 515; *Hill v. Bridges*, 17 Ch. D. 342; *King v. Chick*, 39 Ch. Div. 567; 51 & 52 Vict. c. 59 (Preferential Payments, —wages and salaries, rates and

taxes).

(*l*) 46 & 47 Vict. c. 52, s. 125; 53 & 54 Vict. c. 71, s. 21; *Higgs v. Weaver*, 29 Ch. Div. 236; In re *Williams*, *Jones v. Williams*, 36 Ch. Div. 573; *Atkinson v. Powell*, 36 Ch. Div. 233.

CHAPTER XII.

OF TITLE BY ESCHEAT.



ESCHEAT, we may remember, was one of the fruits and consequences of feudal tenure (*a*). The word itself (which is of Norman-French extraction) signifies chance or accident; but with us it is applied to the chance or case (which only very rarely happens) of the owner of an estate in fee simple dying without having disposed of it, and leaving no heir behind him to take it by descent; in which case, by the doctrine of escheats, it results back, by a kind of reversion, to the original grantor or lord of the fee (*b*). And here it is to be observed, that the land so escheating afterwards follows the seignior, as being a fruit thereof. Therefore, if the lord was entitled to the seignior by purchase, the land escheated will descend to his heirs general; if by descent, it will be inheritable only by such of his heirs as are capable of inheriting the seignior (*c*).

In order to complete this title by escheat, it is necessary that the lord perform an act of his own, by *entering* on the lands and tenements so escheated; and on failure herein, or in doing any act that amounts to an implied waiver of his right, as by accepting rent of a stranger who usurps the possession, his title by escheat is barred (*d*); nevertheless, the title by escheat (like the title by descent) is properly referable to the head of title by “act of law.”

(*a*) 2 Bl. Com. 244.

(*d*) Bl. Com. ubi sup.; Bro. Ab.

(*b*) 11 Feud. 86; Co. Litt. 13 a. tit. Acceptance, 25; Co. Litt. 268.

(*c*) Co. Litt. ubi sup.

The law of escheat is founded upon this single principle, that the inheritance of land held in fee simple having failed, it must become what the feudal writers denominate *feudum apertum*, and must result back again to the lord of the fee, by whom (or by those whose estate he hath) it was given (*e*).

Escheats have been frequently divided into those *propter defectum sanguinis*, and those *propter delictum tenentis*; the one sort, if the tenant should die without an heir, the other, if his blood be attainted (*f*); and we propose successively to advert to both sorts, beginning with—

I. Escheats *propter defectum sanguinis*. By the law, as it stood till recently, an escheat of this sort took place,—

First, where the owner in fee simple of land, of which he had been himself the purchaser, died without disposing of the same, and leaving none related to him by consanguinity, or none who was not subject to some disability such as prevented his becoming heir to any person whatever.

Secondly, where the owner in fee simple of land which he had derived by descent from some person as purchaser, (or which was descendible as if one of the owner's ancestors had been the purchaser), died without disposing of the same, and leaving none related by consanguinity to such purchaser or ancestor, or none not subject to such disability as just mentioned; but in this latter case, if the last owner died leaving a person related to *him* by consanguinity, though not a relation on the side of him from whom the land had descended, or was descendible (*g*), the statute 22 & 23 Vict. c. 35, s. 19 (as stated in the last chapter), has now provided, that where there shall be a total failure of heirs of the purchaser (or where any land shall be descendible as if an ancestor had been the purchaser thereof, and there shall be a total failure of the

(*e*) 2 Bl. Com. 245.

(*f*) Co. Litt. 13 a, 92 b.

(*g*) Doe *d.* Blackburn *v.* Blackburn, 1 Moody & Robinson, p. 547.

heirs of such ancestor), then, and in every such case, the land shall descend, and the descent shall thenceforth be traced from *the person last entitled* to the land, as if he had been the purchaser thereof.

The law having been thus altered, an escheat now takes place only in the following cases,—First, where the person last entitled to land in fee simple dies without having disposed of the same, and leaving none related by consanguinity either to the person (if any) from whom he derived by descent, or to himself; Secondly, where he dies without having disposed of the land, and leaving none so related who is not at the same time subject to a personal disability to take as heir. The first of these cases requires no further remark. As to the second, the persons who are under such disability may be classed as follows:—

1. [A monster, which hath not the shape of mankind, but in any part evidently bears the resemblance of the brute creation, hath no inheritable blood, and cannot be heir to any land, albeit it be brought forth in marriage; but, although it hath deformity in any part of its body, yet if it hath human shape, it may be heir. This is a very antient rule in the law of England, and its reason is too obvious and too shocking to bear a minute discussion (*h*). And if there appears no other heir than such a prodigious birth, the land shall escheat to the lord.

2. Bastards are incapable of being heirs. Bastards by our law, are such children as are not born of lawful wedlock (*i*). Such are held to be *nullius filii*, the sons of nobody; for the maxim of the law is, “*Qui ex damnato coitu nascuntur, inter liberos non computantur*” (*k*). Being thus the sons of nobody, they have in them no inheritable blood; consequently none of the blood of the first purchaser; and therefore, if there be no other claimant than such illegitimate children, the land shall escheat to the

(*h*) Co. Litt. 7 b; Bract. l. 1, c. 6, s. 7; and l. 5, tr. 5, c. 30, s. 10. (*k*) Co. Litt. 8 a; Bract. ubi sup.

(*i*) 2 Bl. Com. 247.

[*lord* (*l*). The civil law differs from ours in this point, and allows a bastard by birth to succeed to an inheritance, if legitimated after it was born by the lawful marriage of its father and mother (*m*): and also if the father had no lawful wife or child, then, even if the concubine was never married to the father, yet she and her bastard son were admitted each to one-twelfth of the inheritance (*n*) and a bastard was likewise capable of succeeding to the whole of his mother's estate, although she was never married; the mother being sufficiently certain, though the father is not (*o*). But our law, in favour of marriage, is much less indulgent to bastards.

There is indeed one instance in which our law has shown bastards some little regard; and that is usually termed the case of *bastard eigné* and *mulier puisné*. This happens when a man has a bastard son, and afterwards marries the mother, and by her has a legitimate son, who in the language of the law is called a *mulier*, or, as Glanvil expresses it in his Latin, *filius mulieratus* (*p*); the woman before marriage being *concubina*, and afterwards *mulier*. Now here the eldest son is bastard, or *bastard eigné*: and the younger son is legitimate, or *mulier puisné*. If then the father dies, and the *bastard eigné* enters upon his land, and enjoys it to his death, and dies seised thereof whereby the inheritance descends to his issue; in this case, the *mulier puisné* and all other heirs (though minors, married women, or under any incapacity whatsoever) are totally barred of their right (*q*). And this, 1. As a punishment on the *mulier* for his negligence, in not entering during the bastard's life and evicting him. 2. Because the canon law (following the civil) did allow such *bastard eigné* to be legitimate, on the subsequent marriage of his mother: and therefore the laws of England (though they would not admit either the civil or canon law to rule

(*l*) Finch, Law, 117.

(*m*) Nov. 89, c. 8.

(*n*) Ib. c. 112.

(*o*) Cod. 6, 57, 5.

(*p*) L. 7, c. 1.

(*q*) Litt. s. 399.

[the inheritances of this kingdom, yet) paid such a regard to a person thus peculiarly circumstanced, that, after the land had descended to his issue, they would not unravel the matter again, and suffer his estate to be shaken. Moreover, these rules as to the *bastard eigné* applied also when a man had two daughters, the elder of whom was a bastard, and they both entered peaceably as co-parceners (*r*). But this indulgence was shown to no other kind of bastard; for if the mother was never married to the father, such bastard could have no colourable title at all (*s*).

As bastards cannot be heirs themselves, so neither can they have any heirs but those of their own bodies. For all collateral kindred consists in being derived from the same common ancestor, and as a bastard has no legal ancestors, he can have no collateral kindred; and consequently can have no legal heirs, but such as claim by a lineal descent from himself. And therefore if a bastard purchase land, and die seised thereof without issue, and intestate, the land shall escheat to the lord of the fee (*t*);] but, of course, a bastard (equally with any one else) may, by will or deed, dispose of his estate, so as to prevent an escheat thereof (*u*).

3. As the law stood until a recent period, aliens also were incapable of taking by descent; for they were not allowed to have any inheritable blood in them; rather indeed upon a principle of national or civil policy, than upon reasons strictly feudal (*x*). And therefore, if a man left no other relations but aliens, his land escheated to the lord.

As aliens could not inherit, so far they were on a level with bastards; but as they were also disabled to hold real estate by *purchase*, they were under still greater disabilities (*y*). And as they could neither hold by purchase,

(*r*) Co. Litt. 244 a.

(*s*) Litt. s. 400.

(*t*) Bract. l. 2, c. 7; Co. Litt.

244.

(*u*) 1 Prest. Est. 468.

(*x*) 2 Bl. Com. 249; Co. Litt. 8 a.

(*y*) Co. Litt. 2 b.

nor take by inheritance, so they could have no heirs, since they could have nothing for an heir to inherit (z).

Moreover, at one time, aliens could not be the *channels* of descent; for we are told by Sir Edward Coke, that if an alien cometh into England, and there hath issue two sons, who are thereby natural-born subjects, and one of them purchases land and dies; yet neither of these brethren can be heir to the other (a). For (continues he) the *commune vinculum*, or common stock of their consanguinity, is the father: and as he had no inheritable blood in him, he can communicate none to his sons; and, when the sons can by no possibility be heirs to the father, the one of them shall not be heir to the other. And though this opinion of his was afterwards overruled (b), it was only on the ground that the descent from one brother to the other might be considered as *immediate*, and without regard to the *commune vinculum*.

[The subject, however, of tracing descent through an alien, subsequently to the time of Lord Coke, became regulated by Act of Parliament. For it was enacted by the statute 11 Will. III. c. 6 (c), that all persons natural-born subjects of the king, might inherit and make their title by descent from any of their ancestors, (lineal or collateral,) although their father or mother, or other ancestor, by, from, through, or under whom they derived their pedigrees, were born out of the king's allegiance.] And such is still the law as to tracing descent in regard to any estate which accrued before the 12th May, 1870,—the day on which passed the "Naturalization Act" of that year (33 & 34 Vict. c. 14). But by the second section of that statute it was provided, with regard to all titles accruing *after* that date, that real property of every description may be taken, acquired, held and disposed of by

(z) 1 Lev. 59.

(a) Co. Litt. 8 a.

(b) Collingwood v. Pace, 1 Vent.

Kynnaid v. Leslie, Law Rep., 1 C. P. 389.

(c) 25 Geo. 2, c. 39; Co. Litt. 415; 1 Lev. 59; 1 Sid. 193; by Harg. 8 a (n.).

an alien, in the same manner in all respects as by a natural-born British subject; and that a title thereto may be derived through, from, or in succession to an alien as if he had been a natural-born British subject (*d*).

Such is the state of the law with respect to escheats *propter defectum sanguinis*; as to which we shall only further observe, that by the Trustee Act, 1893 (56 & 57 Vict. c. 53), another case is withdrawn from the operation of escheat,—viz., where the land was held by the party deceased, *under a trust or mortgage*,—it being provided by this statute (as it had been in substance by earlier enactments), for the protection of the party beneficially interested, that where a trustee or mortgagee dies intestate without an heir (or his heir or devisee is not known), and without a legal personal representative, the Court shall have power to make an order vesting the lands in such person and in such manner as the Court shall direct (*e*).

II. We now arrive at the consideration of escheats *propter delictum tenentis*; which was, where, by attainder, the blood of the person attainted became, in the eye of the law, so corrupted as to be no longer inheritable.

Attainder imports that extinction of civil rights and capacities which took place whenever a person who had committed treason or other felony received judgment of death or outlawry for his crime; and (besides other consequences) at one period of our law it involved in certain cases *the corruption of blood*, so as to prevent the descent of land to the offender or his heirs.

The old law with respect to corruption of blood upon attainder, and the consequent escheat of the offender's lands and tenements to the lord of the fee, has been so much altered by the modern enactments to which we shall

(*d*) 33 & 34 Vict. c. 14, s. 2.

tained in the Trustee Act, 1850 (13

(*e*) 56 & 57 Vict. c. 53, s. 26, repealing the like provisions con-

& 14 Vict. c. 60), ss. 14, 19.

presently refer, as to have lost much of its former importance; still some account of it is desirable (*f*).

According to the antient law, by the commission of treason, or other felony, the blood of the tenant was corrupted and stained, and the original donation of the feud was thereby determined, it being always granted to the vassal on the implied condition of *dum se bene gesserit*; upon the thorough demonstration of which guilt by legal attainder, the feudal covenant and mutual bond of fealty were held to be broken, the estate instantly fell back from the offender to the lord of the fee, and the inheritable quality of his blood was extinguished and blotted out for ever.

This escheat to the *lord* by reason of his tenant's attainder, must be carefully distinguished from forfeiture to the *crown*; consequences which by reason of their similitude in some points, and because the crown, being very frequently the immediate lord of the fee, was therefore entitled to both, have been often confounded together. For, independently of any escheat, the felon's lands and tenements (to the extent of his interest therein) were, by force of the attainder, immediately forfeited to the crown (*g*).

Escheat to the lord, therefore, operated in subordination to forfeiture to the crown; indeed, the law of forfeiture was (in the case of treason at least) of older date in this country than that of escheat; for the former doctrine prevailed in the old Saxon times (*h*), while the latter appears to have been the result of the introduction of the Norman tenures (*i*).

Hitherto we have only spoken of estates vested in the offender, at the time of his attainder. And here the law of forfeiture stopped; but the law of escheat pursued the matter still further. For the blood of the tenant being,

(*f*) 2 Bl. Com. 252—256.

(*g*) 1 Inst. 64; 1 Salk. 85.

(*h*) Wilkins' Leges Anglo-Sax. Ll. Alfred, c. 4; Ll. Canut. 54.

(*i*) 2 Bl. Com. 252.

on his attainder, utterly corrupted and extinguished, it followed, not only that all that he then had should escheat from him, but also that he should be incapable of inheriting anything for the future: and this may further illustrate the distinction between forfeiture and escheat. If, therefore, a father was seised in fee, and the son committed treason and was attainted, and then the father died, here the land would escheat to the lord; because the son, by the corruption of his blood, was incapable to be heir, and there could be no other heir during his life; but nothing would be forfeited to the king, for the son never had any interest in the lands to forfeit (*k*); and in this case the escheat operated, and not the forfeiture. On the other hand, the forfeiture might take effect and not the escheat; as where a new felony was created by Act of Parliament, and it was provided (as was frequently the case) that it should not extend to corruption of blood; here the lands of the felon would not escheat to the lord, but yet the profits of them would be forfeited to the king for a year and a day, and so long after as the offender lived (*l*).

There was yet a further consequence of the corruption and extinction of hereditary blood, which was this, that the person attainted would not only be incapable himself of inheriting, or transmitting his own property by heirship, but would also obstruct the descent of lands or tenements to his posterity, in all cases where they were obliged to derive their title through him from any remoter ancestor. The channel which conveyed the hereditary blood from his ancestors to him, was not only exhausted for the present, but totally dammed up and rendered impervious for the future. This was a refinement upon the antient law of feuds; which allowed that the grandson might be heir to his grandfather, though the son in the intermediate generation was guilty of felony (*m*). But, by the law of

(*k*) Co. Litt. 13 a.(*m*) Van Leeuwen, in 2 Feud. 31.(*l*) 3 Inst. 47.

England, a man's blood was so universally corrupted by attainder, that his sons could neither inherit to him nor to any other ancestors, at least on the part of their attainted father (*n*).

This corruption of blood could not be absolutely removed but by authority of Parliament. The king might excuse the public punishment of an offender; but even the king could not abolish the private right, which had accrued, or might accrue, to individuals as a consequence of the criminal's attainder. He might remit a forfeiture, in which the interest of the crown alone was concerned; but he could not wipe away the corruption of blood; for therein a third person had an interest, namely, the lord who claimed by escheat. If, therefore, a man had a son, and was attainted, and afterwards pardoned by the king, this son could never inherit to his father, or his father's ancestors; because his paternal blood, being once thoroughly corrupted by his father's attainder, must continue so; but if the son had been born after the pardon, he might inherit; because by the pardon the father was made a new man, and might convey new inheritable blood to his after-born children (*o*).

But the doctrine of corruption of blood on attainder, arising as it did from feudal principles, and perhaps extending further than even those principles warranted, gradually came to be regarded as a peculiar hardship; and therefore in most (if not all) of the new felonies from time to time created by parliament since the reign of Henry the eighth, it was declared that they should not extend to any corruption of blood. And in our own times the spirit of those enactments became infused into the general law of the realm; and whatever savoured of inhumanity or harshness under the antient system was effectually (though by degrees) removed. For by 54 Geo. III. c. 145, it was provided that no attainder for

(*n*) Co. Litt. 391 b.

(*o*) Co. Litt. 392 a.

felony, except for *treason* or *murder*, should extend to the disinheriting of, nor to the prejudice of, any person other than the offender himself during his life. Again, by the *Inheritance Act*, (3 & 4 Will. IV. c. 106,) when the person, from whom descent is to be traced, has had any relation who having been attainted has died before such descent, such attainder will not prevent the descent from being traced through such relation, unless where the estate has already escheated on such attainder before 1st January, 1834 (*p*). Moreover, by the *Trustee Act*, 1850 (13 & 14 Vict. c. 60), s. 46, it was enacted that no lands, stock, or chose in action, vested in any person upon any *trust*, or by way of *mortgage*, should escheat by reason of the attainder or conviction of the trustee or mortgagee for any offence; and by the 33 & 34 Vict. c. 23, s. 1, no confession, verdict, inquest, conviction, or judgment for any treason or felony or *felo de se*, after the 4th day of July, 1870, is to cause any attainder or corruption of blood or any forfeiture or escheat (*q*); and as regards any trustee or mortgagee becoming a convict within the meaning of that Act, it has now been provided by the *Trustee Act*, 1893 (*r*), s. 48, that the legal estate shall remain in such convict, or (as the case may be) survive to his co-trustee or co-trustees or descend to his representative, exactly as if he had not become a convict.

In conclusion of the chapter we may remark, that where (under the former law) an escheat or forfeiture of the beneficial interest in lands actually took place, its consequences were frequently remitted, when the crown was the party entitled to take the benefit. For, in such event, the sovereign, by modern Acts of Parliament, was

(*p*) 3 & 4 Will. 4, c. 106, s. 10.

(*q*) The Act, however, preserves *in statu quo* the law of forfeiture consequent on *outlawry* (33 & 34 Vict. c. 23, s. 1); but inasmuch as, by the statute 42 & 43 Vict. c. 59,

outlawry in all *civil* proceedings has been abolished, the exception of outlawry contained in the statute 33 & 34 Vict. c. 23, can only refer now to *criminal* proceedings.

(*r*) 56 & 57 Vict. 53.

frequently empowered to make grants for the purpose of restoring the land to the family of the former beneficial owner; or to carry into effect any grant, conveyance, or devise of the same that such owner might have intended to make (*s*); and by the Intestates Estates Act, 1884 (*t*), s. 6, this power in the crown has now been declared generally, and the mode of application to the crown for a waiver of the forfeiture or escheat, is also thereby prescribed; and the effect of the confirming grant is, by the Act, declared to be the same as that of a crown grant made after office-found, unless within two years of the confirming grant an inquisition shall have issued in the manner prescribed by the statute.

(*s*) 39 & 40 Geo. 3, c. 88, s. 12; c. 94; 6 Geo. 4, c. 17.
 47 Geo. 3, sess. 2, c. 24; 59 Geo. 3, (*t*) 47 & 48 Vict. c. 71.

CHAPTER XIII.

OF TITLE BY OCCUPANCY.



[OCCUPANCY is the taking possession of those things which theretofore belonged to nobody ; and this is, indeed, supposed to have been the true ground and foundation of all property. But when once it was agreed that everything capable of ownership should have an owner, natural reason suggested, that he who could first declare his intention of appropriating anything to his own use, and in consequence of such intention actually took it into his possession, should thereby gain the absolute property of it ; according to the doctrine recognized by the laws of Rome, *quod nullius est, id ratione naturali occupanti conceditur* (a).

This right of occupancy, so far as it concerns real property (for of personal chattels we do not in this place speak), hath been confined by the laws of England within a very narrow compass and never extended beyond a single instance ; namely, where a man was tenant *pur autre vie*, that is, had an estate granted to himself only (without mentioning his heirs) for the life of another man, and died during the life of *cestui que vie* ; in this case, he that could first enter on the land might have lawfully retained the possession so long as *cestui que vie* lived, by right of *common occupancy* (b).

This seems to have been recurring to first principles, and calling in the law of nature to ascertain the property

(a) Ff. 41, 1, 3.

Bearcroft, Carter, 59 ; Vaughan,

(b) Co. Litt. 41 b ; Geary v. 187.

[of the land, when left without a legal owner. For it did not revert to the grantor, though at one time it was supposed so to do (*c*),—for he had parted with all his interest so long as *cestui que vie* lived; it did not escheat to the lord of the fee,—for all escheats must be of the absolute entire fee, and not of any particular estate carved out of it, much less of so minute a remnant as this; it did not belong to the grantee,—for he was dead; it did not descend to his heirs,—for there were no words of inheritance in the grant;] nor could it vest in his executors, for (at the period of which we speak) an estate *pur autre vie* seems not to have been devisable by will (*d*). Belonging therefore to nobody, like the *hereditas jacens* of the Romans, the law left it open to be seized and appropriated, under the name of an occupant, by the first person that could enter upon it during the life of *cestui que vie* (*e*). But if the estate *pur autre vie* had been granted to a man and his heirs during the life of *cestui que vie*, there could not then be a title by common occupancy, but the heir of the grantee would succeed, and was called a *special* occupant (*f*). And so the law continues to this day,—the heir succeeding, according to the doctrine most commonly received, in virtue of a special exclusive right (by the terms of the original grant) to enter upon and occupy the land during the residue of the estate granted; for (it is argued) as his ancestor had no estate of inheritance, he cannot, properly speaking, take by descent; but according to other authorities, the heir (though termed a special occupant) does in reality take by descent; and his estate, though not a fee, is a descendible freehold (*g*).

(*c*) Bract. l. 2, c. 9; l. 4, tr. 3, c. 9, s. 4; Flet. l. 3, c. 12, s. 6; l. 5, c. 5, s. 15.

(*d*) Powell on Devises, p. 34.

(*e*) 2 Bl. Com. p. 259.

(*f*) Atkinson v. Baker, 4. T. R. 229; Carpenter v. Dunsmure, 3 Ell. & Bl. 918; Westfaling v.

Westfaling, 3 Atk. 460; Ripley v. Waterworth, 7 Ves. 425; Fitzroy v. Howard, 3 Russ. 230.

(*g*) Doe v. Martin, 2 W. Bl. 1150; Doe d. Blake v. Luxton, 6 T. R. 291; Bearpark v. Hutchinson, 7 Bing. 188.

An estate *pur autre vie* may be granted not only to a man and his heirs, but to a man and the heirs of his body ; and this is termed a *quasi entail* ; the interest so granted not being properly an estate tail,—for the statute *De donis* applies only where the subject of the entail is an estate of inheritance (*h*),—but yet so far in the nature of an estate tail, that it will go to the heir of the body of the grantee as special occupant, during the life of *cestui que vie*. And an estate *pur autre vie* so limited may be also granted with a remainder thereon during the life of *cestui que vie* : but, in such case, the alienation of the *quasi* tenant in tail will bar not only his issue but also those in remainder ; and the alienation for that purpose (unlike that of an estate tail properly so called) may be effected by *any* method of conveyance *inter vivos* (*i*).

In order to remedy the inconvenience attaching to the previous law with regard to the occupancy of estates *pur autre vie*, during the interval between the death of the owner and that of the *cestui que vie*, careful provisions have been made by the legislature in modern times. For by the Statute of Frauds, (29 Car. II. c 3,) s. 12, and by 14 Geo. II. c. 20, s. 9, an estate *pur autre vie* was rendered devisable by will, and (in default of such disposition) was made liable, in the hands of the heir as special occupant, or of the personal representatives, as the case might be, to the debts of the deceased owner ; and subject thereto, was made distributable among the next of kin (*k*). And though these provisions were repealed by the new Wills Act (7 Will. IV. & 1 Vict. c. 26), fresh enactments have been made in that statute, in terms somewhat more extensive, to the following effect ;—that an estate *pur autre vie*, of whatever tenure, and whether it be a corporeal or incorporeal

(*h*) Co. Litt. by Harg. 20 a, n. (5).

Hopkins *v.* Ramadge, 1 Batty, 365.

(*i*) Norton *v.* Frecker, 1 Atk. 524 ;

(*k*) Co. Litt. by Harg. 41 b, n. (5) ;

Grey *v.* Mannock, 2 Eden, 339 ;

Doe *d.* Lewis *v.* Lewis, 9 Mee. &

Dillon *v.* Dillon, 2 Ball & B. 77 ;

W. 662.

hereditament, may be devised by last will and testament (*l*); that if no disposition by will be made of an estate *pur autre vie* of a freehold nature, it shall be chargeable in the hands of the heir (if it comes to him by reason of special occupancy) as assets by descent, as in the case of freehold land in fee simple (*m*): that in case there shall be no special occupant of an estate *pur autre vie*, of whatever tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant: and that, in every case where it comes to the hands of such personal representative, whether by special occupancy or in virtue of that Act, it shall be assets in his hands, to be applied and distributed in the same manner as personal estate (*n*).

It is only in an estate *pur autre vie* (as already remarked), that our law affords any example of the acquisition of land by occupancy. It is difficult at least to put any other instance wherein there is not some owner of the land appointed by the law (*o*). [In the case of a sole corporation, as the parson of a church, when he dies or resigns, though there is no *actual* owner of the land till a successor be appointed, yet there is a *legal, potential* ownership subsisting in contemplation of law; and when the successor is appointed, his appointment shall have a retrospect and relation backwards, so as to entitle him to all the profits from the instant that the vacancy commenced. And in all other instances, when the tenant dies intestate, and no other owner of the lands is to be found in the common course of descent, there the law vests an ownership in the crown, or in the subordinate lord of the fee, by escheat.]

So also, where the laws of other nations give a right by occupancy, as in lands newly created by the rising of an island in the sea or in a river, or by the alluvion or dereliction of the waters; in these instances the law of England

(*l*) 7 Will. 4 & 1 Vict. c. 26, s. 3.

(*m*) Sect. 6.

(*n*) Sect. 6.

(*o*) 2 Bl. Com. p. 261.

assigns them an immediate owner (*p*). Thus, in case a new island rise in the *sea*, though the civil law gives it to the first occupant (*q*), yet ours gives it to the sovereign (*r*). And as to lands gained from the sea, either by *alluvion*, that is, the washing up of sand and earth, so as in time to make *terra firma*; or by *dereliction*, as when the sea shrinks back below the usual water-mark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land immediately behind, for *de minimis non curat lex*. But if the alluvion or dereliction be sudden and considerable, in this case it belongs *de jure communi* to the crown; for the soil, when the sea flowed over it, was *primâ facie* the crown's property (*s*), and therefore ought to remain so, though no longer covered by the sea (*t*). And upon the same principle, a sudden inundation from the sea will not deprive the former owner of the land submerged of his previous property therein (*u*); though, on the other hand, it has been decided, that where the sea gains upon the land by gradual advance, (the crown being the owner between high and low water-mark,) the crown becomes also the owner of the land newly covered with water (*x*). [It is said too, by Bracton, that if an island rise in the middle of a *river*, it belongs to those who have lands on each side thereof, in common; but if it be nearer to one bank than the other, it belongs only to him who is proprietor of the nearest shore (*y*). Yet this seems only to be reasonable where the soil of the river is equally divided between the owners of the opposite shores; for if the whole soil is the freehold of any one man,—as it usually is when—

(*p*) 2 Bl. Com. p. 261.

(*q*) Inst. 2, 1, 22.

(*r*) Hale, *de Jure Maris*, p. 17; Callis, of Sewers, p. 45.

(*s*) Hale, *ubi sup.* p. 14; Blundell *v.* Catterall, 5 B. & Ald. 268.

(*t*) 2 Bl. Com. 262; Hale, *ubi*

sup.; 2 Roll. Abr. 170; Dyer, 326; Callis, pp. 51, 53; Scrutton *v.* Brown, 4 Barn & Cress. 505.

(*u*) Hale, *de Jure*, &c., pp. 15, 17.

(*x*) In re Hull and Selby Railway, 5 Mee. & W. 327.

(*y*) Bract. lib. 2, c. 2.

[ever a several fishery is claimed (*z*),—there it seems just (and so is the constant practice) that the eyots or little islands, arising in any part of the river, shall be the property of him who owneth the fishery and the soil. It is further laid down in our books, that if a river running between two lordships, by degrees gains upon the one, and thereby leaves the other dry, the owner who loses his ground thus imperceptibly has no remedy; but if the course of the river be changed by a sudden and violent flood, or other hasty means, his land will not be lost (*a*). And this law of alluvions and derelictions, with regard to rivers, is nearly the same in the imperial law, from whence indeed those our determinations seem to have been drawn and adopted; but we ourselves, as islanders, have applied them to *marine* increases (*b*).]

(*z*) *Smith v. Kemp*, Salk. 637; C. P. D. 438.
Mayor of Carlisle v. Graham, L. R., (*a*) Callis, p. 51.
 4 Exch. 361; *Foster v. Wright*, 4 (*b*) 2 Inst. 1, 20, 21, 22, 23, 24.

CHAPTER XIV.

OF TITLE BY FORFEITURE.



FORFEITURE is a punishment annexed by law to some illegal act, or negligence, on the part of the owner of lands or hereditaments, whereby he loses all his interest therein, and they go to the party injured as a recompense for the wrong which either he alone, or the public together with himself, hath sustained (*a*).

Lands may be forfeited by various means; some of which it will not be convenient to discuss in this place, as they are incidental only to subjects of a more general description, belonging to other divisions of the work; but there are three kinds of forfeiture which require a distinct and separate consideration, and to which the present chapter will consequently be devoted. The first of them accrues by alienation in mortmain; the second, by the wrongful alienation of particular tenants; and the third, by wrongful disclaimer.

1. [Alienation in *mortmain*, *in mortuâ manu*, is an alienation of lands or tenements to any corporation,—sole or aggregate, ecclesiastical or temporal (*b*). But these purchases having been chiefly made by religious houses, in consequence whereof the lands became perpetually inherent in one “dead hand,” this hath occasioned the general appellation of mortmain to be applied to such alienations; and the religious houses themselves to be principally considered in forming the statutes of mortmain.]

(*a*) 2 Bl. Com. p. 267.

(*b*) Co. Litt. 2 b.

By the common law, a corporation is as capable of purchasing lands as an individual (*c*)—subject to this distinction, that persons corporate take the fee to hold to their *successors*, instead of their *heirs*. Yet it has always been necessary for corporations to have a licence in mortmain from the crown, to enable them to become the holders of lands (*d*) ; for as the king is the ultimate lord of every fee, he ought not, unless by his own consent, to lose his privilege of escheats and other feudal profits, by the vesting of lands in tenants who can never die. [And such licences of mortmain seem to have been necessary among the Saxons, above sixty years before the Norman conquest (*e*). But besides this general licence from the king, as lord paramount of the kingdom, it was also requisite, whenever there was a mesne or intermediate lord between the king and the alienor, to obtain his licence also (upon the same feudal principles), for the alienation of the specific land. And if no such licence was obtained, the king or other lord might respectively enter on the lands so aliened in mortmain, as for a forfeiture.] Yet such were the influence and ingenuity of the clergy, that, notwithstanding this fundamental principle, we find that the largest and most considerable dotations of religious houses without licence, happened within less than two centuries after the Conquest. [But when these began to grow numerous it was observed that the feudal services, ordained for the defence of the kingdom, were every day visibly withdrawn ; and that the lords were curtailed of the fruits of their seigniories,—their escheats, wardships, reliefs, and the like. And therefore, in order to prevent this, it was ordered by the second of king Henry the third's great charters (*f*), and afterwards by that printed in our common

(*c*) Case of Sutton's Hospital,
10 Rep. 30 ; Co. Litt. 2 b.

(*d*) F. N. B. 221.

(*e*) Selden, Jan. Angl. l. 2, s. 45 ;
Hallam, Middle Ages, vol. ii. p.
321, 7th ed.

(*f*) A.D. 1217, c. 43, edit. Oxon.

[statute books, that all such gifts should be void, and the land forfeited to the lord of the fee (*g*).

But as this prohibition extended only to religious *houses*, bishops and other sole corporations were not included therein; and the aggregate ecclesiastical bodies—who, Sir Edward Coke observes (*h*), in this were to be commended, that they ever had of their council the best learned men that they could get—found many means to creep out of this statute, by buying in lands that were holden of themselves as lords of the fee, and thereby evading the forfeiture; or by taking long leases for years, which first introduced those extensive terms, for a thousand or more years, which became so frequent in conveyances. This produced the statute *De religiosis*, 7 Edw. I.;—which provided, that *no person*, religious or other whatsoever, should buy, or sell, or receive under pretence of a gift or lease, or any other title whatsoever; nor should by any art or ingenuity appropriate to himself; any lands or tenements in mortmain: upon pain that the immediate lord of the fee, or, on his default for one year, the lords paramount, and, in default of all of them, the king, might enter thereon as for a forfeiture (*i*).

This seemed to be a sufficient security against all alienations in mortmain; but as these statutes extended only to gifts and voluntary conveyances between the parties, the religious houses now began to set up a fictitious title to the land which it was intended they should have, and to bring an action to recover it against the tenant, who by fraud and collusion made no defence; and thereby judgment was given for the religious house, which then *recovered* the land by sentence of law upon a supposed prior title. And thus they had the honour of inventing those fictitious adjudications of right which afterwards became the great assurances of the kingdom, under the name of *common*

(*g*) Mag. Chart. (25 Edw. 1).

(*h*) 2 Inst. 75.

(*i*) The 7 Edw. 1 is repealed by 51 & 52 Vict. c. 42.

[*recoreries* (*k*). But, upon this, the statute of Westminster the Second (13 Edw. I.) c. 32 (*l*), enacted that in such cases a jury shall try the true right of the demandants or plaintiffs to the land; and if the religious house or corporation be found to have it, they shall still recover seisin; otherwise it shall be forfeited to the immediate lord of the fee, or else to the next lord, and finally to the king, upon the immediate or other lord's default. And the like provision was made by the succeeding chapter (cap. 33), in case the tenants set up crosses upon their lands (the badges of knights templars and hospitallers) in order to protect them from the feudal demands of their lords, by virtue of the privileges of those religious and military orders. So careful indeed was this provident prince to prevent any future evasions, that when the statute of *Quia emptores* (18 Edw. I. c. 3) abolished all subinfeudations, and gave liberty for all men to alienate their lands to be holden of their next immediate lord, he caused a proviso to be inserted that this should not extend to authorize any kind of alienation in mortmain (*m*). And when afterwards the method of obtaining the king's licence by writ of *ad quod damnum* was recognized by 27 Edw. I. (stat. 2), it was further provided by 34 Edw. I. (stat. 3) that no such licence should be effectual without the consent of the mesne or intermediate lords (*n*).

Yet still it was found difficult to set bounds to ecclesiastical ingenuity; for when they were driven out of all their former holds, they devised a new method of conveyance, by which the lands were granted, not to themselves directly, but to nominal feoffees *to the use of* these religious houses; thus distinguishing between the *possession* and the *use*, and receiving the actual profits, while the seisin of

(*k*) Hist. Eng. Law, by Reeves,
vol. ii. p. 155.

(*m*) 2 Inst. 501.

(*l*) Now repealed by 51 & 52
Vict. c. 42.

(*n*) Hist. Eng. Law, by Reeves,

vol. ii. p. 230.

[the lands remained in the nominal feoffee; who was held by the courts of equity (then under the direction of the clergy) to be bound in conscience to account to his *cestui que use* for the rents and emoluments of the estate; and it is to these inventions that we are indebted for the introduction of the “uses and trusts,” before-mentioned, and which are the foundation of modern conveyancing. But the inventors themselves did not long enjoy the advantages of their new device; for the statute 15 Rich. II. c. 5 (*o*), enacted, that the lands which had been so purchased to uses should be amortised by licence from the crown, or else be sold to private persons; and that for the future, uses should be subject to the statutes of mortmain, and forfeitable like the lands themselves. And whereas the statutes had been eluded by purchasing large tracts of land adjoining to churches, and consecrating them by the name of churchyards, such subtle imagination was also declared to be within the compass of the statutes of mortmain. And civil or lay corporations, as well as ecclesiastical, were also declared to be within the mischief, and of course within the remedy provided.]

The policy of these statutes prohibitory of alienation in mortmain, was afterwards considered as fit to be extended also to the case where lands, though not conveyed to corporate bodies, were given *on trust* for parish churches or other institutions, “erected and made of devotion;”—for the trustees to carry such uses into effect being generally numerous, and the land belonging, on the decease of each trustee, to the survivors, these gifts operated like gifts in mortmain, properly so called, to the diminution of descents with their attendant feudal perquisites, and, for the same reason, to the diminution of escheats (*p*). It was consequently declared by the statute 23 Henry VIII. c. 10, that all future grants of lands in trust for any of the

(*o*) Now repealed by 51 & 52
Vict. c. 42.

(*p*) Hist. Eng. Law, by Reeves,
vol. iv. p. 237.

purposes aforesaid, if for any longer term than twenty years, should be void (*q*).

[As to the prohibition, however, to aliene to bodies corporate, it is to be observed, that, during all this time, it was in the power of the crown, by granting a *licence of mortmain*, to remit the forfeiture, so far as related to its own rights; and to enable any spiritual or other corporation to purchase and hold any lands or tenements in perpetuity; which prerogative is declared and confirmed by the statute 18 Edw. III. stat. 3, c. 3. But as doubts were conceived at the time of the Revolution how far such licence was valid (*r*)—since the king had no power to dispense with the statutes of mortmain by a clause of *non obstante*, which was the usual course, though it seems to have been unnecessary (*s*); and as, by the gradual declension of mesne seigniories through the long operation of the statute of *Quia emptores*, the rights of immediate lords were reduced to a very small compass,—it was therefore declared by the statute 7 & 8 Will. III. c. 37, that the crown for the future, at its own discretion, might grant licences to aliene or take in mortmain, of whomsoever the tenements might be holden; and although this statute has been now repealed (by the Mortmain Act, 1888, to be presently mentioned), still its provisions, as they are above stated, remain in full force.

Nor was this the only relaxation that, in comparatively early times, took place in the law of mortmain; for the statutes of mortmain were suspended for twenty years, by the statute 1 & 2 Ph. & M. c. 8; and during that time any lands or tenements were allowed to be granted to any spiritual corporation without any licence whatsoever.] And it was afterwards enacted by 17 Car. II. c. 3 (*t*), and

(*q*) The 23 Hen. 8, c. 10, has been repealed by 51 & 52 Vict. c. 42.

(*r*) 2 Hawk. P. C. 391; Co. Litt. by Harg. 99 a, n. (1); stat. 1 W.

& M. sess. 2, c. 2.

(*s*) Co. Litt. 99 a.

(*t*) By 1 & 2 Vict. c. 106, s. 15, the statute of 17 Car. 2. c. 3, was repealed; but it was revived (so far

by many subsequent Acts—among which may be particularized 2 & 3 Anne, c. 20 (*u*), 43 Geo. III. c. 108, 55 Geo. III. c. 147, 3 & 4 Vict. c. 60, 6 & 7 Viet. c. 37, s. 22, 17 & 18 Viet. c. 84, and 19 & 20 Viet. c. 104, s. 23—that augmentations of *poor livings* might be made free from the restrictions of the statutes of mortmain; and under other modern statutes, grants of land are now permitted to be made without any licence in mortmain to corporate bodies, for purposes connected with the *education of the poor*, or with *charities* and the like (*x*). And by the 33 & 34 Vict. c. 34, trust funds held for *public* and *charitable purposes* may be invested in real securities, without the trustees being deemed thereby to have acquired land within the meaning of the mortmain Acts.

In another direction, however, the law of mortmain as it existed in the time of Henry VIII. was afterwards made more stringent. For, it having been held that the statute 23 Henry VIII. before mentioned did not extend to any thing but *superstitious* uses (*y*); and that therefore a man might give lands, notwithstanding that statute, on trust for the maintenance of a school, or the sustenance of poor people, or upon any other *charitable* use (*z*); and it being apprehended “from recent experience” that persons on their death-beds might make “large and impro-

as this subject is concerned) by 6 & 7 Vict. c. 37, s. 25.

(*u*) By this Act the fund usually called *Queen Anne’s Bounty* is in part regulated.

(*x*) See 4 & 5 Vict. c. 38; 7 & 8 Vict. c. 37; 16 & 17 Vict. c. 137, s. 27; 17 & 18 Viet. c. 112; 18 & 19 Viet. c. 124, ss. 35, 41; 31 & 32 Vict. c. 44; 45 & 46 Vict. c. 21; and 53 & 54 Vict. c. 19,—as to sites for buildings for *religious, educational*, and other charitable purposes; 22 Viet. c. 27, ss. 1, 2, and 34 & 35 Viet. c. 13, as to *recreation*

grounds, public parks, &c.; and 55 & 56 Viet. cc. 11, 31, as to *small holdings* and other *public* purposes, under County Councils (51 & 52 Viet. c. 41) and Parish Councils (56 & 57 Viet. c. 73). See also 23 & 24 Viet. c. 134, s. 3, as to certain *Roman Catholic charities*; and 45 & 46 Viet. c. 73, as to the sites of *ancient monuments*.

(*y*) Porter’s case, 1 Rep. 24; Adams and Lambert’s case, 4 Rep. 104; *Da Costa v. De Pas*, Ambl. 228.

(*z*) 43 Eliz. c. 4; 52 Geo. 3, c. 101; Bac. Abr. Char. Us.

vident" dispositions even for these good purposes, to the disherison of their lawful heirs (*a*), it was therefore enacted by the "Mortmain Act," 9 Geo. II. c. 36 (*b*), that no lands or hereditaments, or money to be laid out in the purchase thereof, should be given or conveyed, or anyways charged or incumbered, in trust for, or for the benefit of, any *charitable* use whatsoever, unless by deed (*c*), executed in the presence of two witnesses twelve calendar months before the death of the donor (*d*), and enrolled in Chancery within six calendar months after its execution (*e*),—and unless such gift was made to take effect immediately (*f*), and was without power of revocation, or other clause or covenant for the benefit of the donor, or those claiming under him. And if these several conditions were not complied with, not only was the charitable use inoperative, but the conveyance itself was void to all intents and purposes (*g*). But by 24 & 25 Vict. 9 (amended by 25 & 26 Vict. c. 17), the restriction in the Mortmain Act as to clauses for the benefit of the donor was so far qualified that there might thereafter be contained, in any assurance for charitable uses made after the 17th May, 1861, a clause or covenant in the donor's favour,—provided it should con-

(*a*) 2 Bl. Com. 273.

(*b*) Att.-Gen. *v.* Stewart, 2 Meriv. 161; Luckraft *v.* Pridham, 6 Ch. D. 214.

(*c*) Under the 9 Geo. 2, c. 36, such deed was required also to be *indented*; but by 24 and 25 Vict. c. 9, s. 1, it needed not either to be indented or to purport to be indented; and such continues to be the law (51 & 52 Vict. c. 42).

(*d*) Wickham *v.* Marquis of Bath, Law Rep., 1 Eq. Ca. 17.

(*e*) However by 29 & 30 Vict. c. 57, deeds otherwise valid, but not theretofore enrolled, might be authorized to be enrolled, on the court

being satisfied that the deed was made *bonâ fide* for full and valuable consideration, and that the omission to enrol arose from mere ignorance, inadvertence, or accident; and this provision is maintained by sect. 5 of the 51 & 52 Vict. c. 42.

(*f*) A demise would be deemed to take effect *immediately*, if it took effect within a year from its date (26 & 27 Vict. 106; which statute not being among those repealed by the 51 & 52 Vict. c. 42, is still in force).

(*g*) Doe *v.* Wrighte, 2 Barn. & Ald. 710.

sist of the grant or reservation of a *nominal* rent, or of mines, minerals, or easements: or of provisions or covenants as to buildings, roads, and the like, for the better enjoyment as well of the property granted as of the adjacent property; or of provisions as to re-entry, on breach of such last-mentioned covenants, or other stipulations of the like nature,—the donor, however, reserving, in all such cases, for his representatives the same benefits as for himself, in order to comply with the statute (*h*).

It will be observed that the Mortmain Act 9 Geo. II. c. 36, altogether prevented any disposition, *by will*, of lands (or of money to be laid out in lands) in trust for any charitable use (*i*). On the other hand, its provisions were made subject to partial exception in the case of *stock in the public funds*; as to which, instead of a deed executed *twelve* months before the donor's death, it was required that the transfer in the bank books should be made *six* months at least before his death (*k*). There was also an exception where the transaction was a *bonâ fide* purchase, a full valuable consideration being paid down, or reserved by way of annual payment (*l*): and such purchases would (by more recent Acts) have been valid, notwithstanding the death of the vendor within twelve months after the execution of the deed; and also though a *substantial* and not a nominal rent were reserved to the vendor as the consideration for the assurance (*m*). Gifts to the Universities of Oxford and Cambridge, or to any of their colleges, or in trust for the scholars on the foundations of Eton, Winchester, and Westminster (*n*),—or in favour of the British Museum (*o*),—were also entirely exempted from the operation of the Mortmain Acts.

(*h*) The 24 & 25 Vict. c. 9, and 25 & 26 Vict. c. 17, have been repealed by the 51 & 52 Vict. c. 42.

(*i*) *Brook v. Badley*, Law Rep., 3 Ch. App. 672; *In re Watmough's Trusts*, ib., 8 Eq. Ca. 272.

(*k*) 9 Geo. 2, c. 36, s. 1.

(*l*) *Ibid*.

(*m*) 9 Geo. 4, c. 85; 27 & 28 Vict. c. 13, s. 4.

(*n*) 9 Geo. 2, c. 36, s. 4.

(*o*) 5 Geo. 4, c. 39.

The statute 9 Geo. II. c. 36 (with most of the other Acts above referred to), has recently been repealed by the Mortmain and Charitable Uses Act, 1888 (*p*), and in the last-mentioned Act the former provisions regarding mortmain and charitable uses respectively have been consolidated, with some very slight amendments. And, firstly, as regards alienation in mortmain, land may not (except with the licence of the crown) be acquired “by or on behalf of any corporation” (not authorized in that behalf by statute), under pain of forfeiture of such land to the crown, failing entry by the mesne lord (if any) for twelve months (*q*); but the sovereign may grant licences to alienate and to acquire in mortmain (*r*). And, secondly, as regards assurances to charitable uses (*s*), the assurance of the land or of money to be laid out in the purchase of land (unless it be a registered disposition under the Land Transfer Act, 1875), must be a deed, with two witnesses, executed twelve calendar months before the death, and enrolled in the Supreme Court (Central Office) within six calendar months of its execution, and taking effect in possession immediately, and being without any power of revocation or reservation other than of a peppercorn rent, or of mines or minerals, or of easements, or of building provisions, and (in the case of *bonâ fide* purchase deeds) other than of a rent or rent-charge regarded as portion of the purchase-money payable: and stock to be laid out in land must be transferred in the books of the company six calendar months before the death (*t*). But as regards assurances for the purpose of a public park, an elementary school-house, or a public museum, none of the provisions which have just been specified are applicable, the will or deed (as the case may be) by which the gift is made being, in these cases, only required to be executed twelve calendar months

(*p*) 51 & 52 Vict. c. 42.

(*q*) Sect. 1.

(*r*) Sect. 2.

(*s*) Sect. 13, repealing 43 Eliz. c. 4, but in substance re-enacting it.

(*t*) Sect. 4.

before the death, and to be enrolled with the Charity Commissioners six calendar months after the death ; but the area of the land must not exceed one acre for a school-house, two acres for a museum, and twenty acres for a park ; and these last-mentioned exemptions have now (*u*) been extended also to conveyances made by deed of gift to any local authority for any of the lawful purposes of such authority. Also, the provisions of the Mortmain Act, 1888, as regards assurances to charitable uses (though not those as to alienation in mortmain) are made inapplicable to the Universities of Oxford, Cambridge, London, and Durham, and to the Victoria University, and their several colleges, and the colleges of Eton, Winchester, and Westminster, and Keble College, all which specified universities and colleges are accordingly exempt from these provisions of the Act (*x*).

The Mortmain Act of 1888 has been itself amended by the Mortmain Act, 1891 (*y*) ; and by the amending Act, it has now been enacted (by sects. 5 and 6) that land may be assured by will to a charitable use, subject to this, that the land must be sold within a year from the death of the testator, or such longer time as shall be allowed either by the High Court or by the Charity Commissioners ; and if the land remains unsold after the time limited for the sale thereof, it is to vest in the official trustee of charity lands ; and thereafter it is to be sold as soon as may be under the order of the Charity Commissioners, the proceeds of sale (less the expenses) vesting in the official trustees of charitable funds in trust for the charity ; but these provisions extend only to the wills of testators dying after the 5th August, 1891 (*z*). The amending Act also provides (by sect. 8) for the permanent retention unsold of any land so given, which the High Court or the Charity Commissioners may authorise to be so retained ; but the Court or

(*u*) 55 & 56 Vict. c. 11.(*y*) 54 & 55 Vict. c. 73.(*x*) 51 & 52 Vict. c. 42, s. 7.(*z*) Ib. s. 9.

the Commissioners must be first satisfied that the land is wanted for actual occupation by the charity for the purposes of the charity. And as regards money given by will to a charity, with a superadded direction to lay out such money in the purchase of land, the gift is now good, and the superadded direction only is void (*a*); and money secured on land, or other personal estate arising from or connected with land, is no longer to be regarded as land within the meaning of the Mortmain Acts (*b*).

2. [Alienations by *particular tenants*, when they conveyed by common law conveyances, such as feoffment, fine, or recovery, a greater estate than the law entitled them to make, were, at common law, forfeitures to the person in immediate remainder or reversion (*c*). As if tenant for his own life aliened by feoffment for the life of another, or in tail or in fee;—these being estates which either must or might last longer than his own, the creating them was not only beyond his power, and inconsistent with the nature of his interest, but was also a forfeiture of his own particular estate, to him in remainder or reversion, who was entitled to enter immediately (*d*). For which the reason seems to be, that the tenant, by thus taking upon himself to assert a more extensive right than he derived from the lord of the fee, violated the feudal compact (which bound him to fidelity), and consequently no longer deserved to retain its benefit (*e*). He had therefore, by his own act,

(*a*) 54 & 55 Vict. s. 7.

(*b*) *Ib.* s. 3.

(*c*) According to Blackstone (vol. ii. p. 274), “the forfeiture accrues “when the alienations are greater “than the law entitles them to “make, and *divest the remainder “or reversion,”* which is also the expression of Lord Coke. (*Co. Litt.* 251 a.) But where the reversion or remainder is in the crown, it is not divested, and yet a forfeiture equally accrued. (*Co. Litt.* 251 b.) So the

levying of a fine in fee, by the particular tenant, of a thing lying in grant, used to work a forfeiture; and yet it did not divest the remainder or reversion. (Podger’s case, 9 Rep. 106 b.)

(*d*) Blackstone (vol. ii. p. 274) cites *Litt. s.* 415.

(*e*) *Gilb. Ten.* 38, 39; where, after observing that if the vassal renounced the feud this was always a cause of forfeiture by the old feudal law, the learned author pro-

[determined his own original interest; and, on such determination, the next taker was entitled to enter regularly, as in his remainder or reversion (*f*). The same law which is thus laid down with regard to tenants for life, held also with respect to lessees and other tenants of mere chattel interests. But if a tenant in tail aliened in fee, this was no immediate forfeiture to the remainderman, but a mere *discontinuance*, as it was called, of the estate tail (*g*), which the issue might afterwards avoid by one of the class of actions called *real*; or, after the abolition of real actions, simply by entry: the reason assigned being that he in remainder or reversion had only a very remote and barely possible interest therein, until the issue in tail was extinct (*h*).

This kind of forfeiture, viz. by the illegal alienation of particular tenants, differs altogether from forfeiture by breach of condition in deed, to which we had occasion to refer in a former chapter; for the reversioner is, in that case, *in* as of his former seisin; and consequently not only the estate of the tenant himself, but all interests derived out of it (even though derived before the forfeiture) are defeated (*i*): but in the case of forfeiture by such illegal alienation, all rightful estates previously created, and all charges lawfully made on the land, are good and available in law, the forfeiture operating in this respect as a voluntary surrender would do.] The whole subject, however, of forfeiture by alienation has now lost much of its former importance, in consequence of changes in the state of the law relative to the chief conveyances by which this doctrine of the common law was brought into operation; viz. the abolition of fines and recoveries by 3 & 4 Will. IV. c. 74, and

ceeds to remark, that “if the
“tenant for life makes a feoffment,
“or levies a fine, it is palpably
“contrary to his oath of fidelity to
“the reversioner, and therefore
“that is a plain renunciation of
“the feud.”

(*f*) Bl. Com. ubi. sup.

(*g*) Co. Litt. 328 a; 2 Inst. 335;
Co. Litt. by Butler, 333 a, n. (1).

(*h*) 2 Bl. Com. p. 275.

(*i*) Gilb. Ten. 200; Dy. 344 a;
4 Rep. 24 a; Co. Litt. 234 a; 1
Roll. Ab. 474.

the provision of 8 & 9 Viet. c. 106, s. 4, formerly noticed, “ that a feoffment made after 1st of October, 1845, shall “ not have any tortious operation.”

3. [Analogous both in its nature and in its consequences, to an illegal alienation by the particular tenant, is the *disclaimer* of such a tenant; as where he neglects to render his lord the due services, and upon an action brought to recover them, disclaims to hold of his lord; which disclaimer of tenure, in any court of record, is a forfeiture of the lands upon reasons most apparently feudal (*k*).] And so, likewise, if the particular tenant does any act which amounts to a *virtual disclaimer*,—as if, being tenant for life only, he claims, in any court of record, to have in the estate a larger interest (*l*). And in one case, where a tenant for years gave up possession of the demised premises to a third party who claimed paramount to the landlord, with intent to assist that party in setting up the adverse title—such behaviour was held a *virtual disclaimer*, and to work a forfeiture of his lease (*m*).

(*k*) Finch, 270, 271.

(*l*) Co. Litt. 251 b.

(*m*) Doe *d.* Ellerbrook *v.* Flynn,
4 Tyrw. 619; Doe *d.* Graves *v.*
Wells, 10 Ad. & Ell. 427.

CHAPTER XV.

OF TITLE BY ALIENATION.



THE most usual title to real estates is that by *alienation* or conveyance, a title which comprises every voluntary resignation by one man, and acceptance by another, of an estate, whether effected by sale, gift, marriage settlement, devise, or other transmission of property with the mutual consent of the parties.

The title by alienation is of more recent origin in the law of England than the title by descent. [For by the feudal law, a pure and genuine feud could not be transferred from one feudatory to another, without the consent of the lord : lest thereby a feeble tenant might have been substituted to perform the feudal services, instead of one on whose abilities and fidelity the lord could depend. And as the feudatory could not aliene it in his lifetime, so neither could he by will defeat the succession, nor even alter the course of it. Nor could he originally aliene the estate, even with the consent of the lord, unless he had also obtained the consent of his own next apparent or presumptive heir (*a*). And therefore it was usual in very antient feoffments, to express that the alienation was made by consent of the heirs of the feoffor : or the heir apparent himself would sometimes join with the feoffor in the grant (*b*). And, as the feudal obligation was reciprocal, so neither could the lord aliene or transfer his seignior]

(*a*) Co. Litt. 94 ; Wright, Ten.
169.

(*b*) Madox, Formul. Angl. Nos.
316, 319, 427,

[without the consent of the tenant, for it was esteemed unreasonable to subject the feudatory to a new superior without his own approbation (*c*). This consent of the tenant was expressed by what was called *attorning*, or professing to become the tenant of the new lord: and the doctrine of attornment was afterwards extended to all lessees for life or years; between whom and the lessor there still exists (as we have seen) the feudal relation of lord and tenant (*d*). Accordingly, if one bought an estate with any lease for life or years standing out thereon, and the lessee refused to attorn to the purchaser, the grant or contract was in most cases void, or at least incomplete; and this was also an additional clog upon alienation (*e*).

But by degrees this feudal severity wore off; and a law of King Henry the first allowed a man to sell and dispose of lands which he himself had purchased; as contradistinguished from those which had been transmitted to him in a course of descent from his ancestors (*f*); and yet originally he was not allowed to sell the whole of his own acquisitions, so as totally to disinherit his children, any more than he was at liberty to aliene his paternal estate (*g*). Afterwards, he seems to have been at liberty to part with all his own acquisitions, provided he had previously purchased them to him and his *assigns* by name (*h*); and he

(*c*) Gilb. Ten. 83.

(*d*) Attornment was also necessary upon the grant of a *remainder*, or a *reversion*; and for this, the reasons given were, 1st, that the remainder-man came in by the feudal feoffment, which could only be by attornment *coram paribus*; and 2nd, because the action of waste against the tenant for life and the right of forfeiting his estate accrued to the remainder-man, to whom therefore it was fit that the tenant for life should attorn. (Gilb. Ten. 90, 91.)

(*e*) Litt. § 551.

(*f*) "*Emptiones vel acquisitiones suas det cui magis velit. Terram autem quam ei parentes dederunt, non mittat extra cognationem suam.*"—Wilkins, Leg. Ang.-Sax. LL. Hen. 1, c. 70; Feud. l. 2, t. 39.

(*g*) "*Si questum tantum habuerit is, qui partem terræ suæ donare voluerit, tunc quidem hoc ei licet; sed non totum questum, quia non potest filium suum hæredem exheredare.*"—Glanv. l. 7, c. 1.

(*h*) Mirr. c. 1, s. 3.

[was also then allowed to part with one-fourth of the inheritance of his ancestors, without the consent of his heir (*i*): but by the great charter of Henry the third, no alienation was permitted of any part of the land, unless sufficient was left to answer the services due to the superior lord (*k*); which sufficiency was probably interpreted to be one-half (*l*). But these restrictions were, as regards alienations *inter vivos*, removed by the statute of *Quia emptores* (18 Edw. I.), whereby all persons, except the king's tenants *in capite*, were left at liberty to aliene all or any part of their lands at their own discretion, subject only to the provision that all conveyances of the fee should be to hold of the chief lord, and not of the grantor; and by the statute 1 Edw. III. st. 2, c. 12, the king's tenants *in capite* also were permitted to aliene on paying a fine to the king (*m*). Again, by the temporary statutes 7 Hen. VII. c. 2, and 3 Hen. VIII. c. 4, all persons attending the king in his wars were allowed to aliene their lands without licence, and were relieved from other feudal burdens. And, lastly, fines for alienations were, in all cases of freehold tenure, entirely abolished by the statute 12 Car. II. c. 24.] The restraints upon *devising* lands, *i. e.*, on alienating lands, by will, were partially taken off by the old Statute of Wills (32 Hen. VIII. c. 1), and were at length totally removed, as an effect of the abolition of military tenures by the statute of Charles the second just mentioned; for the statute 32 Hen. VIII. c. 1, had enabled tenants to devise the entirety of their free and common socage lands, into which tenure (as we have stated in an earlier part of this treatise) all the lands theretofore held by the tenure of knight's service were converted by the statute 12 Car. II. c. 24. The doctrine of *attornment* continued later than any of the other restrictions on alienation; many methods were tried to

(*i*) *Mirr.* ubi sup.

(*k*) 9 Hen. 3, c. 32.

(*l*) Dalrymple, of Feuds, 95; 2

Bl. Com. p. 161.

(*m*) 2 *Inst.* 67.

evade it (*n*) ; and at last, by the statute 4 & 5 Anne, c. 3 (sometimes cited as 4 Anne, c. 16), s. 9, attornment ceased to be necessary to complete any grant or conveyance, *scilicet*, any voluntary grant or conveyance ; for attornment is still necessary in the case of lands being taken upon an *elegit* or otherwise under a judgment obtained *in invitum* (*o*) ; also, when the court appoints a receiver, it invariably directs that the tenants shall attorn to the receiver—and that for a very good reason, for the ownership of the land may, meanwhile, have passed into some third party not affected by the judgment or order of the Court (*p*). And we may also here observe that by the statute 11 Geo. II. c. 19, s. 11, the fraudulent attornment of the tenant to a stranger, to the prejudice of his landlord's possession, is rendered wholly inoperative (*q*).

The result of the several relaxations above referred to has been, the complete disengagement of the realty from all the feudal restraints on alienation ; so that, subject to very few exceptions, all estates in land are now freely transferable, unless granted under express stipulation to the contrary. And such stipulations are in most instances inefficacious to the end designed ; for if repugnant to the estate granted, or if otherwise contrary to the policy of the law, they are regarded as void and disregarded. Thus, if an estate be conveyed in fee simple, with a condition prohibiting the grantee and his heirs, or the grantee himself, from all alienation thereof, the condition is merely void (*r*) ; and a similar proviso, annexed to an estate tail, will not prevent the tenant from making a valid conveyance in fee simple, in such method as the law has prescribed for that purpose (*s*). And when under the Settled Land Act,

(*n*) 2 Bl. Com. 290.

(*o*) *Harris v. Booker*, 4 Bing. 99.

(*p*) *Bailey v. Barnes*, (1894) 1 Ch. 25.

(*q*) 4 Geo. 2, c. 28, s. 6 ; 5 & 6 Vict. c. 108, s. 16 ; *Brown v.*

Storey, 1 Man. & Gr. *in notis*, p. 129.

(*r*) Co. Litt. 222 b, 223 a ; *Rosher v. Rosher*, 26 Ch. Div. 801.

(*s*) *Ib.* 123 b, 223 b ; *Mary Portington's case*, 10 Rep. 35 ; *Roe v.*

1882 (*t*), tenants for life and other limited tenants were enabled (subject to the provisions of the Act) to alienate the fee simple of the lands, the legislature thought fit to provide that any restriction or attempted restriction on the exercise of such power of alienation under pain of forfeiture or other penalty should be simply void (*u*).

Estates at will or at sufferance, however, are, for reasons obviously resulting from their nature and constitution, not assignable. And besides these, there were, at the common law, some other interests which, generally speaking, were incapable of transfer. For a man who had been ousted of the possession of his land by the wrongful act of a stranger, so as to retain a *right of entry* only, could not in general have conveyed that right to another, lest justice should have been trodden down and the weak oppressed (*x*); and the same law was established with respect to a *contingent* interest (*y*), as to which however, this further doctrine obtained, that though not generally transferable at law, yet the assignment of such contingent interest, if for value, was deemed effectual in equity (*z*). But by 7 Will. IV. & 1 Vict. c. 26, s. 3, both a right of entry and a contingent interest were made capable of passing by way of *devise*; and by 8 & 9 Vict. c. 106, these classes of interests may now also pass *by deed*, the last-mentioned statute having provided that after the 1st October, 1845, a contingent, an executory, and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not

Galliers, 2 T. R. 133; *In re Machu*, 21 Ch. D. 838; *Dugdale v. Dugdale*, 38 Ch. Div. 176.

(*t*) 45 & 46 Vict. c. 38; and see Book ii. Pt. i. c. xxiv.

(*u*) 45 & 46 Vict. c. 38, s. 51.

(*x*) 2 Bl. Com. 290; *Kennedy v. Lyell*, 15 Q. B. D. 491.

(*y*) *Goodtitle v. Morse*, 3 T. R. 371; *Doe v. Martin*, 5 Barn. & Cress. 527; *Christmas v. Oliver*, 10 Barn. & Cress. 181; *Right v. Bucknell*, 2 Barn. & Adol. 278.

(*z*) 1 Prest. Est. 89; 1 Fonb. Tr. Eq. 213, 214.

ascertained,—and also a right of entry, whether immediate or future, and whether vested or contingent, in or upon any tenements or hereditaments in England, of any tenure,—may be disposed of by deed (a).

We shall now proceed to inquire, first, *who* may aliene, and to *whom* : and, secondly, *how* a man may aliene.

I. Who may aliene, and to whom : or, in other words, who is capable of conveying and who of accepting such conveyance. And herein we must consider rather the incapacity than the capacity of the several parties ; for all persons are *primâ facie* capable both of making and of accepting conveyances, unless the law has laid them under any particular disabilities.

It is clear that at one period of our law *attainted* persons, though they might purchase lands, were disabled from holding them (b),—the lands so purchased being subject to escheat and forfeiture, as already explained. They were also incapable of conveying, so as to affect the crown or the lord, and that *from the time of the offence committed* ; for such conveyance might tend to defeat the crown of its forfeiture, or the lord of his escheat (c) ; but as regards the present state of the law, these positions require to be considered in connection with the modern statutes affecting escheat and forfeiture, which have been noticed in a former chapter.

In like manner *corporations*, religious or other, may purchase lands ; yet, unless they have a licence to hold in mortmain, they cannot in general retain such purchase, but it shall be forfeited to the lord of the fee ; unless, of course, in the excepted cases mentioned in the previous chapter. As to their power of *alienation*, they might in general, at the common law, make estates at their pleasure

(a) 8 & 9 Vict. c. 106, s. 6 ; Hunt v. Dodds, 2 B. & Ald. 275.

v. Remnant, 9 Exch. 635.

(c) Co. Litt. 42 b ; Doe v. Prit-

(b) 2 Bl. Com. p. 290 ; Bullock chard, 5 B. & Adol. 782.

of any lands and tenements they held in their corporate right (*d*)—though, as to ecclesiastical corporations *sole*, this power was somewhat restrained by the necessity of obtaining the confirmation of certain other parties to make the alienation binding on their successors;—and with this general right of alienation the legislature has only interfered in particular instances (*e*). Thus the powers of alienation belonging at the common law to ecclesiastical corporations and to *lay* corporations being colleges or hospitals, are now regulated by a variety of Acts, of which an account will be found in that chapter of this work which treats of the endowments and provisions of the Church (*f*). The powers of alienation belonging at the common law to *lay* corporations being *municipal* corporations (*viz.*, incorporated towns) were also restricted by the 5 & 6 Will. IV. c. 76, by which Act they were disabled from selling or mortgaging any lands, tenements, or hereditaments, (and in general also from demising them for any term exceeding thirty-one years,) except in pursuance of some agreement entered into by the body corporate before the 5th June, 1835: though by the same Act, and by 6 & 7 Will. IV. c. 104, it was provided that any disposition whatever of such lands, tenements, or hereditaments might be made *with the approbation of the lords of the treasury*, or any three of them; and on such terms as they might think fit to sanction; and although the provisions referred to have been repealed by the 45 & 46 Vict. c. 50, the Act which now regulates municipal corporations, still the like provisions have been re-enacted by the last-mentioned Act, the provisions of which are to the effect following, that is to say:—By sects. 108, 109, the town council may not, without the approval of the Treasury, sell, mortgage, or alienate any corporate property, unless pursuant to some enabling Act of Parlia-

(*d*) 2 Bl. Com. 318.(*f*) Vide post, bk. iv. pt. II.(*e*) *Colchester v. Lowten*, 1 Ves. c. III.

& B. 226.

ment; or, without such approval, lease the corporate property, save for a term not exceeding (in the general cases) thirty-one years or (in exceptional cases) seventy-five years (*g*); but with such approval, may make any sale, mortgage, lease, or other alienation of the corporate property on terms approved by the Treasury, including (by sect. 111) leases for 999 years for workmen's dwellings. Also, by sect. 110, under any agreement for renewal in force on the 5th June, 1835, and binding on the corporation, or when there has been an established usage of renewal, the town council may grant leases in renewal of existing leases on the old accustomed terms, or on such other terms as the corporation might have done if the Municipal Corporations Act, 1882, had not been passed (*h*); and the consent of the Local Government Board has now, in all these cases, been substituted for the consent of the Treasury (*i*).

The conveyances of *insane persons* (except during a lucid interval) are also, generally speaking, void (*k*); and the conveyances of idiots are altogether void. It is said, indeed, that the feoffment of a lunatic is not absolutely *void* but *voidable* only, owing to the solemnity of the livery, which is an essential part of that conveyance—the practical difference between a void and a voidable transaction being chiefly this, that the former is a mere nullity, and

(*g*) By sect. 124 of the Municipal Corporations Act, 1882, re-enacting the like provision contained in 2 & 3 Will. 4, c. 69, s. 3, municipal corporations are restrained from selling lands, &c., to defray the expenses of parliamentary elections.

(*h*) As to the sale, by municipal corporations, of their church patronage, see 45 & 46 Vict. c. 50, s. 122, re-enacting the like provisions contained in 5 & 6 Will. 4, c. 76, s. 139; 6 & 7 Will. 4, c. 77, s. 26;

c. 104, s. 3; and 1 & 2 Vict. c. 31; and as to grants, by corporations of seaport towns, of sites for Sailors' Homes, see 17 & 18 Vict. c. 104, s. 546; and as to grants by any municipal corporation of lands for public recreation or playgrounds, see 22 Vict. c. 27, s. 3; or for school sites for the poor, see 4 & 5 Vict. c. 38; 12 & 13 Vict. c. 49; and 14 & 15 Vict. c. 24.

(*i*) 51 & 52 Vict. c. 41, s. 72.

(*k*) *Thompson v. Leach*, Comb. 468.

therefore incapable of confirmation, while the latter may be either avoided or confirmed *ex post facto* (*l*). The feoffment may be avoided during the lunatic's life by the person legally authorized to act for him; or, after his death, by his heir, or any other person interested (*m*); there is, however, a somewhat antiquated idea that it cannot be avoided by himself, on the ground of his own past insanity, there being a maxim in the law, in regard to transactions merely *voidable*, that no man shall be allowed to stultify himself, that is, to plead his own unsoundness of mind in a court of justice (*n*). But the maxim in question has undoubtedly no application where the transaction by one *non compos* is absolutely *void* (*o*), which it is in the case of all conveyances other than a feoffment. Such being the state of the law with respect to *alienation* by one insane, it is laid down, on the other hand, that he is competent to *purchase* (*p*), though he cannot be compelled to retain what he purchases,—the transaction (if found to be disadvantageous to him) being liable to subsequent avoidance on the ground of his insanity (*q*).

The conveyances and purchases of *infants*, that is, persons under twenty-one, were in general not void, but voidable; and they might be avoided either by themselves in their lifetime, or by their representatives after their death (*r*). But if a purchase that was voidable had been confirmed by the infant on his coming of age, and he should then have died, it could not afterwards be impeached by his representatives, on the ground of its having been effected during infancy (*s*). And in this we are to

(*l*) 2 Bl. Com. 293; Whelpdale's case, 5 Rep. 119; 2 Inst. 483; Moor, 43.

(*m*) 2 Bl. Com. 292.

(*n*) Beverley's case, 4 Rep. 123 b; Stroud v. Marshall, Cro. Eliz. 398.

(*o*) F. N. B. 202; Litt. s. 405; Jenk. 40; 1 Eq. Ca. Ab. 279.

(*p*) Co. Litt. 3 b.

(*q*) Beavan v. M'Donnell, 9 Exch. 309; 10 Exch. 184.

(*r*) Zouch v. Parsons, 3 Burr. 1794; Moor, 43; Gibbs v. Merrill, 3 Taunt. 307.

(*s*) 2 Bl. Com. 292; 2 Inst. 483; 5 Rep. 119.

be understood as speaking of *conveyances* strictly so called, as distinguished from matters of *contract* only; for the contracts of an infant (unless for necessities) are now, by the Infants' Relief Act, 1874, absolutely void in all cases, and are not confirmable by the infant, even upon his attaining full age (*t*); but apparently the Act in question does not extend to *conveyances* properly so called.

[The case of a *married woman* is somewhat different. She might *purchase* an estate without the consent of her husband; and the conveyance was good during the coverture, till the husband avoided it by some act declaring his dissent (*u*). And though he did nothing to avoid it, or even if he actually consented, the *feme covert* herself might, after the death of her husband, have waived or disagreed to the same; nay, even her heirs might have waived it after her, if she died before her husband, or if in her widowhood she did nothing to express her ratification of the transaction (*x*);] but, of course, the married woman is now bound by her purchase equally as any other purchaser would be (*y*). But all *conveyances* of her estate by a married woman (except so far as regards her interest in land settled, or otherwise belonging to her, for her separate use) are absolutely void, unless made in such particular method as the law has specifically appointed for that purpose (*z*); and this was formerly, for the most part, by fine or recovery; but by 3 & 4 Will. 4, c. 74, it is provided that, in lieu of these proceedings (which the Act abolishes), her conveyance shall, after 31st December, 1833, be by deed *acknowledged* (she having been first examined thereupon apart from her husband) in such form as therein directed, and executed with the concurrence of her husband (*a*); and in this method she may now in general

(*t*) Infants' Relief Act, 1874 (37 & 38 Vict. c. 62).

(*u*) Co. Litt. 3 a.

(*x*) Ibid.

(*y*) Married Women's Property

Act, 1882 (45 & 46 Vict. c. 75); and 56 & 57 Vict. c. 63.

(*z*) 2 Bl. Com. 293.

(*a*) 3 & 4 Will. 4, c. 74, ss. 77,

79, 91; 17 & 18 Vict. c. 75; 45 &

dispose of any estate (not being her separate estate) which she either alone, or she and her husband in her right, may have in lands of any tenure; and by 8 & 9 Vict. c. 106, s. 7, it has been further provided, that an estate or interest in any tenements or hereditaments in England, of any tenure, may be *disclaimed* by a married woman by the like deed in like manner acknowledged; and of course, as regards her separate estate, she may freely dispose of that, like any other person, without a deed acknowledged.

The case of an *alien* is peculiar; for though he has always been able to acquire property of any description by purchase, yet after purchase he could not, at one time, *hold* any land, house, or other tenement, save only a lease for years of a house,—provided he were an alien friend and merchant; for all other purchases, when found by an inquest of office, were immediately forfeited to the king, whether in the meantime conveyed away by the alien or not (*b*); and even this limited capacity was subject to exception, for if the lease was made to an alien *artificer*, then by the statute 32 Hen. VIII. c. 16, s. 13, it was altogether void (*c*); but latterly, by 7 & 8 Vict. c. 66, aliens might take and hold leases of lands or of houses for twenty-one years, provided they were for the purposes of their trade or residence; and now by the Naturalization Act, 1870 (33 & 34 Vict. c. 14), an alien, although being and remaining an alien, may not only acquire and hold real and personal property of every description in the same manner in all respects as a natural-born British subject, but may also as freely dispose of the same.

Having now considered generally the capacities of persons as alienors and alienees respectively, we may now advert, in connection with the capacity or incapacity of *alienors*, to certain specific legislative provisions made from

46 Vict. c. 39, s. 7; *Bancks v. Ollerton*, 10 Exch. 168; *Docwra v. Faith*, 29 Ch. Div. 693.

(*b*) 2 Bl. Com. 293; *Anon.*, 4 Leon. 84.

(*c*) See Co. Litt. 2 b; *Lapierre v. M'Intosh*, 1 Per. & Dav. 629.

time to time, in order to prevent certain specific inconveniences which are apt to arise from the disability of parties, (through insanity, infancy, coverture, or otherwise, as above explained,) to exercise such powers of alienation as would otherwise be incident to their estates. And here we may refer, in the first place, to the provisions of the Lunacy Acts, 1890 and 1891 (*d*), and of the Trustee Act, 1893 (*e*), codifying respectively with amendments the like provisions contained respectively in a great variety of earlier acts, whereby, in respect of the alienation of estates generally considered, whether they be estates held by the party as a trustee or be estates held by him for his own benefit, the Lord Chancellor (or others acting under his authority) may execute instruments for lunatics and infants, during their incapacity to execute them for themselves (*d*). And secondly, and more particularly, we ought here to refer to the Settled Estates Act, 1856 (19 & 20 Vict. c. 120), relating chiefly to the alienation of “settled estates”; for it was mainly in connection with *these*, that (by reason of limitations in favour of parties yet unborn, or owing to the infancy, coverture, or other disability of various parties in existence,) the inconveniences, above referred to, were chiefly felt; and though the Act of 1856, together with some subsequent Acts passed for its amendment, has been repealed, the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), has been substituted for it with the same general object, but with more systematic and comprehensive provisions; and the last mentioned Act has enacted, in order to facilitate leases and sales of settled estates, that the High Court of Justice—upon the application by petition, in a summary

(*d*) 53 & 54 Vict. c. 5; and 54 & 55 Vict. c. 65; and see also 3 & 4 Will. 4, c. 74, ss. 33, 91; 8 & 9 Vict. c. 97, s. 3; c. 118, ss. 20, 137; 13 & 14 Vict. cc. 35, 60; 16 & 17 Vict. c. 70; 18 & 19 Vict.

cc. 13, 43; 20 & 21 Vict. c. 13; 25 & 26 Vict. c. 86, ss. 12—17,—most of the provisions of these earlier Acts having now been repealed.

(*e*) 56 & 57 Vict. c. 53.

way, of any person entitled to the possession or to the receipt of the rents and profits of any such settled estate, for a term of years determinable on his death, or for life, or for any greater interest (*f*)—may authorize leases or sales to be made of such estate. The enactments of the statute, however, are qualified by the directions following, namely, that the application shall be made only with the consent of certain specified parties (*g*), unless when such consent has been, as it may be in particular cases, dispensed with by the court (*h*); and that the powers conferred on the court shall not be exercised where a similar application has been rejected by parliament, or where an express declaration to the contrary is contained in the settlement; and the powers given to the court are not to authorize any lease, sale, or other act beyond the extent to which, in the opinion of the court, the same might have been authorized by the settlor (*i*). By the Settled Land Act, 1882 (*k*), hereinafter particularly dealt with, alienation, whether by sale or leasing, has been now further facilitated in all such cases, and, indeed, has been so far simplified and further facilitated that most transactions of this sort are now carried out under the Settled Land Act, 1882, and not under the Settled Estates Act, 1877, at all.

And in connection with the capacity or incapacity of *alienees*, it may be fit here to advert also to the fact, or principle of our law, that no person can be compelled to take an estate by purchase against his will; and if, therefore, land be conveyed *in invitum*, (as not unfrequently happens, where it is given in trust by will, without the consent of the proposed trustee having been first obtained,) the effect of the conveyance may always be avoided, by the execution of a deed of disclaimer on the part of the dissentient alienee (*l*). But the heir-at-law,

(*f*) 40 & 41 Vict. c. 18, s. 23.

(*g*) Sect. 24.

(*h*) Sects. 25—28.

(*i*) Sects. 38, 39, 55, 56.

(*k*) 45 & 46 Vict. c. 38.

(*l*) *Nicholson v. Wordsworth*, 2 Swanst. 365; *Begbie v. Crook*, 2 Bing. N. C. 70.

and he alone, may not disclaim; that is to say, the heir may not *eo nomine* disclaim; for, of course, he may by other mode of conveyance divest himself of an estate.

II. *How* a man may aliene or convey; and hereunder the several modes of conveyances.

[A transfer of property being once admitted by law, it became necessary that this transfer should be properly evidenced: in order to prevent disputes, either about the fact, as whether there was any transfer at all; or concerning the persons by whom and to whom it was transferred; or with regard to the subject-matter, as of what the thing transferred consisted; or lastly, with relation to the effect and quality of the transfer, as for what period of time (or, in other words, for what estate and interest) the conveyance was made. The legal evidences of this transfer are called the *common assurances* of the kingdom; whereby every man's estate is assured to him, and all controversies, doubts, and difficulties are either prevented or removed.]

These common assurances or *conveyances* (as they are otherwise termed) we shall, in succeeding chapters, examine in due order; but because they are usually transacted by means of that particular kind of instrument called a *deed*, we purpose to consider the nature of deeds generally, and to do this separately and in the first instance, and before we enter upon the different species of conveyances.

CHAPTER XVI.

OF DEEDS.



IN treating of deeds we shall consider, first, what a deed is; secondly, its requisites; thirdly, how it may be avoided; and lastly, the general rules which the law has laid down for its construction.

I. First, then, a deed.—This is a writing sealed and delivered and is used in a great variety of different transactions: among which, one of the most important is the alienation of real estates (*a*). [Such a writing under seal and delivered is sometimes called a charter, *carta*, from its materials (*b*); but most usually, when applied to the transactions of private subjects, it is called “a deed,” *factum*, κατ’ ἐξοχήν, because it is the most solemn and authentic act that a man can possibly perform, with relation to the disposal of his property; and therefore a man shall always be *estopped* by his own deed, that is, shall not be permitted to aver or prove any thing in contradiction to what he has once so solemnly and deliberately avowed (*c*).] And for the same reason, when an engagement has been made by way of simple contract (that is, without deed), and afterwards the very same engagement is made between the same parties by deed, the first con-

(*a*) Co. Litt. 171 b.

352 a; *Pargeter v. Harris*, 7 Q. B.

(*b*) Co. Litt. by Harg. 9 b, n. (1).

708; *De Mora v. Concha*, 29 Ch.

(*c*) Plowd. 434; Co. Litt. 260, D. 268.

tract is merged in the second (*d*); to which may be added this further rule, that a contract by deed is not capable of being contradicted or explained by any other contract or declaration between the same parties, which is not itself also under seal (*e*). If a deed be made by more parties than one, there ought to be regularly as many copies of it as there are parties; and the deed so made is called an *indenture*, because each part used formerly to be cut or indented in acute angles (*instar dentium*, or serrated) on the top, or side, to tally or correspond one with the other (*f*). [At one time, too, when deeds were comparatively concise, it was usual to write both parts on the same piece of parchment, with some word or letters of the alphabet written between them; through which the parchment was cut, either in a straight or in an indented line, in such a manner as to leave half the word on one part and half on the other. Deeds thus made were denominated *syngrapha* by the canonists (*g*); and with us *chirographa*, or hand-writings (*h*),—*cirographum* or *cyrographum*, being usually the word which was divided in the cutting;] and in the indentures of a fine, this custom continued to be observed until the abolition of that species of conveyance. But for a long time past the practice of cutting through any letters became, in all other instances, disused, and even that of indenting saw-wise: the more modern method being to cut the top of the parchment in a waving line; and neither this nor any other method of indenting is now necessary to the legal validity of the instrument (*i*).

(*d*) *Sharpe v. Gibbs*, 16 C. B., N. S. 527.

(*e*) *Gwynne v. Davy*, 1 Man. & G. 857.

(*f*) Litt. s. 371; Co. Litt. 476, 229 a, n. (1).

(*g*) Lyndew. l. 1, t. 10, c. 1.

(*h*) *Mirroure*, c. 2, s. 27; Co. Litt. by Harg. 143 b, n. (4).

(*i*) In certain cases a deed in-

dentured was made by statute essential to the validity of the transaction. (Co. Litt. by Butl. 229 a, n. (2)); and in such cases it was necessary that the deed should be *actually* indented; but by 8 & 9 Vict. c. 106, s. 5, a deed purporting to be an indenture, is to have the effect of an indenture though not actually indented.

[When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the *original*, and the rest are termed *counterparts* (*k*); though of late it is most frequent for all the parties to execute every part; which renders them all originals. A deed made by one party only, is not indented, but *polled* or shaved quite even; and is therefore called a *deed-poll*, or a single deed (*l*).

II. Secondly, the requisites of a deed.—And of these, the first is, that there be persons able to contract and to be contracted with, for the purposes intended by the deed; and also a thing, or subject-matter, to be contracted for: and all these must be expressed by sufficient names (*m*). Thus in every grant there must be a grantor, a grantee, and a thing granted; in every lease a lessor, a lessee, and a thing demised. And the second requisite is, that the deed must be *written* or *printed* (in any character or in any language) either upon paper or on parchment; and it has been said that if on stone, board, linen, leather, or the like, it is no deed (*n*). Wood or stone may be more durable, and linen less liable to rasures, but writing on paper or parchment unites in itself, more perfectly, both those desirable qualities; for there is nothing else so durable, and at the same time so little liable to alteration. It must also have the regular stamps imposed on it by the several statutes for the increase of the public revenue: else it cannot, in general, be given in evidence (*o*).

(*k*) *Burchell v. Clark*, 2 C. P. D. 88.

(*l*) *Mirroure*, c. 2, s. 27; *Litt.* ss. 371, 372; *Gardner v. Lachlan*, 8 Sim. 123.

(*m*) *Co. Litt.* 35 b.

(*n*) *Ibid.* 229 a; *F. N. B.* 122.

(*o*) 2 Bl. Com. 297. The principal enactments now regulating the *stamps* on deeds, are contained

in the Stamp Act, 1891 (54 & 55 Vict. c. 39, which repeals the entirety almost of the Stamp Act, 1870, 33 & 34 Vict. c. 97), and in the 51 Vict. c. 8, ss. 10—20; 52 & 53 Vict. c. 7, ss. 5—17; 52 & 53 Vict. c. 42, ss. 15—20; and 53 & 54 Vict. c. 8, ss. 18—21. By the 14th section of the Stamp Act, 1891, it is provided, that on the pro-

[And it is a third requisite, that the matter of the deed be *legally* and *orderly* set forth; that is, there must be words sufficient to specify the agreement and to bind the parties; which sufficiency must be left to the courts of law to determine (*p*). It is not indeed absolutely necessary in law to have all the formal parts that are usually drawn out in conveyances, so as there be sufficient words to declare clearly and legally the party's meaning (*q*); but as these formal and orderly parts are calculated to convey that meaning in the clearest, distinctest, and most effectual manner, and have been well considered and settled by the wisdom of successive ages, it is prudent not to depart from them without good reason or urgent necessity (*r*); and therefore they shall be here mentioned in their usual order.]

1. The *premises* may be used to set forth the number and names of the parties, with their additions or titles; and, in the case of an indenture, the deed is always formally described as made *inter partes*, that is, as made between such an one *of the one part*, and such another *of*

duction of an instrument chargeable with any duty, as evidence in any court of civil judicature, if the instrument be one which may legally be stamped after execution, it may be received in evidence, saving all just exceptions on other grounds, on payment of the amount of the unpaid duty, and of the penalty payable by law on stamping after execution, and of a further sum of 1*l.*, which penalty is fixed, by the 15th section of the Act, at the sum of 10*l.*, together with interest at 5*l.* per cent. on the amount of the unpaid duty where it exceeds 10*l.* By the 18th section of 51 Vict. c. 8, the person who by the Act is made liable to pay the duty, if he neglects to pay

same, forfeits 10*l.*, and in addition pays the above-mentioned penalty of 10*l.* and interest, and a further penalty equal to the amount of the stamp duty.

(*p*) Co. Litt. 225 a.

(*q*) Co. Litt. 6 a; 8 & 9 Vict. cc. 119, 124; 44 & 45 Vict. c. 41.

(*r*) Where the transaction is a purchase, the purchaser prepares the draft of the conveyance; and when that draft is approved by the vendor, the purchaser also prepares an engrossment of the deed properly stamped, and sees to its due execution; but where the transaction is a lease, the draft and engrossment, properly stamped, of the lease are usually prepared not by the lessee but by the lessor.

the other part. As to which, this distinction was formerly established, that one named as party to an indenture could not covenant therein with a stranger (or person not named as party), nor could the latter take an estate under the deed, except by way of remainder (*s*); though, on the other hand, a stranger might covenant with one who was a party, and bind himself by executing the deed (*t*). But by 8 & 9 Vict. c. 106, s. 5, it is now provided, that an immediate estate and interest in any hereditaments, and the benefit of a condition or covenant respecting any hereditaments, may be taken, though the taker be not named a party to the indenture. The premises also contain the *recital*, if any, of such deeds, agreements, or matters of fact, as are necessary to explain the reasons upon which the present transaction is founded; and herein also is set down the consideration upon which the deed is made. And then follows the certainty of the grantor, grantee, and thing granted (*u*). With respect to the last, that is, the description of the thing granted, a conveyance of any *land* will suffice (as we have elsewhere seen) to pass also the structures or buildings thereon, as well as all mines below the surface; but a conveyance of certain specified land, or of a certain house, (even adding the words *with the appurtenances*,) will not pass other land not specified, although it may have been usually occupied together with the property conveyed: unless indeed the land not specified should consist of the orchard, garden, or curtilage of a house conveyed, in which case it would pass under a grant of the house and its *appurtenances*, or even (as it should seem) under a grant of the house simply (*v*).

2, 3. [Next come the *habendum* and *tenendum*. The office of the *habendum* is properly to determine what estate

(*s*) *Reeves v. Watts*, Law Rep., 1 Q. B. 412.

(*t*) Co. Litt. 259 b; *Berkeley v. Hardy*, 5 B. & Cress. 355.

(*u*) 2 Bl. Com. 298.

(*v*) Co. Litt. by Harg. 5 b, n. (1), 121 b; 2 Saund. by Wms. 401, n. (2); *Hinchliffe v. Kinnoul*, 5 Bing. N. C. 1, 25; *Bolton v. Bolton*, 11 Ch. Div. 970.

[or interest is granted by the deed (*w*). Though this may be performed, and is sometimes performed, in the premises; in which case the *habendum* may lessen, enlarge, explain, or qualify, but not totally contradict, or be repugnant to, the estate granted in the premises (*x*). As if the premises describe a grant to be “to A. and the heirs of his body,” *habendum* “to him and his heirs for ever,” or *vice versâ*; here A. has an estate tail and a fee simple expectant thereon (*y*). But had it been in the premises “to him and his heirs,” *habendum* “to him for life,” the *habendum* would be utterly void; for an estate of inheritance is vested in him before the *habendum* comes, and shall not afterwards be taken away or divested by it (*z*). The *tenendum* “and to hold” is now of very little use, and is only kept in by custom. Formerly it sometimes went on to express the tenure by which the estate granted was to be holden; viz. “*tenendum per servitium militare, in burgagio, in libero socagio, &c.*” But all these being, as we have seen, now reduced to free and common socage, the tenure is never specified, excepting in the case of copyhold or customary-hold lands. Before the statute of *Quia emptores* (18 Edw. I.), it was also sometimes used to denote the lord of whom the land should be holden; but that statute directing all future purchasers to hold, not of the immediate grantor, but of the chief lord of the fee, this use also of the *tenendum* hath been antiquated; though for a long time after we find it mentioned in antient charters, that the tenements shall be holden *de capitalibus dominis feodi*; but as this expressed nothing more than the statute had already provided for, it gradually grew out of use (*a*).

4. Next follow the terms of stipulation, if any, upon which the grant is made; the first of which is the *redde-*

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| (<i>w</i>) Burchell <i>v.</i> Clark, 2 C. P. D. 88. | <i>v.</i> Gibbs, 5 B. & Cress. 709. |
| (<i>x</i>) Shaw <i>v.</i> Kay, 1 Exch. 412. | (<i>z</i>) Baldwin's case, 2 Rep. 23;
Earl of Rutland's case, 8 Rep. 56. |
| (<i>y</i>) Co. Litt. 21 a; 2 Roll. Rep. 19, 23; Cro. Jac. 476; Goodtitle | (<i>a</i>) Madox, Formul. passim. |

[*dum*, or reservation whereby the grantor doth create or reserve some new thing to himself out of what he had before granted (*b*). As “rendering for the same, yearly, the sum of 10s.,” or a peppercorn, or two days’ ploughing, or the like. Under the pure feudal system, this return or rent consisted, in chivalry, principally of military services; and, in villenage, of the most slavish offices. But in socage it has usually consisted of money, though it may still consist of services, or of any other certain profit. To make a *reddendum* good, if it be of any thing newly created by the deed, the reservation must be to the grantors, or some or one of them, and not to any stranger to the deed. But if it be of antient services or the like, annexed to the land, then the reservation may be to the lord of the fee (*c*).

5. Another of the terms upon which a grant may be made is a *condition*; which is a clause of contingency, on the happening of which the estate granted may be defeated; as “provided always, that if the mortgagor shall pay the “mortgagee 500*l*. upon such a day, the whole estate “granted shall determine,” and the like.]

6. As to the clause of *warranty* formerly inserted in conveyances, it has fallen into disuse, but in its connection with the previous state of the law it still deserves some attention from the student (*d*). By this clause the grantor did for himself and his heirs “warrant” and secure to the grantee the estate conveyed. And the origin of this practice seems to be in the feudal constitution, whereby, if the vassal’s title to enjoy the feud was disputed, he might “vouch,” or call the lord or donor to warrant or ensure his gift; which if he failed to do, and the vassal was evicted, the lord was bound to give him another feud of equal value in recompense (*e*). And so, by our antient law, if a man enfeoffed another in fee (a mode of assurance

(*b*) *Burchell v. Clark*, 2 C. P. D. 88.

(*c*) *Browning v. Beston*, Plowd. 132; *Whitlock’s case*, 8 Rep. 71.

(*d*) Co. Litt. by Butl. 365 a, n. (1), 373 b, n. (2).

(*e*) 2 Bl. Com. 300; Feud. 1. 2, t. 8 and 25.

analogous to the original feudal donation), the law annexed a warranty to the grant (*f*). [So, also, after a partition or exchange of lands of inheritance, if either party or his heirs were evicted of his share, the other and his heirs were bound to warranty (*g*); but by 8 & 9 Vict. c. 106, s. 4, there would now be no warranty either upon an exchange or upon a partition. Similarly upon a gift in tail or lease for life, rendering rent, the donor (or lessor) and his heirs were bound to warrant the title (*h*). But in other forms of alienation bearing no sort of analogy to the gift of a feud, no warranty whatsoever was ever held to be implied; and therefore it became necessary, in such cases, to add an express clause of warranty in order to bind the grantor and his heirs; and where the express clause was in fact superadded, it was held that the warranty not only bound the warrantor himself to protect and assure the title of the warrantee, or yield him other lands in their stead, but that it also bound the heir of the warrantor to the same effect—provided he had other sufficient lands by descent from the warranting ancestor (*i*); and this, whether the warranty was *lineal*, or *collateral* to the title of the land. *Lineal* warranty was, where the heir derived, or might by possibility have derived, his title to the land warranted, either from or through the ancestor who made the warranty, as where a father, or an elder son in the life of the father, released to the disseisor of either themselves or the grandfather, with warranty,—this was lineal to the younger son (*k*). *Collateral* warranty was, where the heir's title to the land neither was, nor could have been, derived from the warranting ancestor; as where a younger brother released to his father's disseisor, with warranty:—this was collateral to the elder brother (*l*).]

But though the heir was only bound to insure the title of the grantee on his ancestor's warranty, provided he had

(*f*) Co. Litt. 384 a.

(*g*) Ibid. 174, 384 a.

(*h*) Ibid. 384 b.

(*i*) Co. Litt. 102 a.

(*k*) Litt. ss. 703, 706, 707.

(*l*) Ibid. ss. 705, 707.

assets, yet he was, whether assets descended or not, perpetually debarred from claiming the land *himself*. But this doctrine being found under certain circumstances to produce inconvenient and unjust results, statutes were passed to restrain the force of a warranty in this respect in a variety of instances; and the practice itself, of inserting in deeds any clause of warranty, fell by degrees out of use (*m*).

7. [A deed of conveyance usually also contains *covenants*,—which are clauses of agreement (*conventiones*), whereby either party may stipulate for the truth of certain facts, or may bind himself to perform or to abstain from something, or to give something to the other. Thus the grantor may covenant that he hath a right to convey; or for the grantee's quiet enjoyment, or the like; or the grantee may covenant to pay his rent, or to keep the premises in repair, or not to use them in a certain manner, and the like.] By the common law, the use of the words “demise,” “grant,” or “give,” raised an *implied* covenant on the part of the grantor for quiet enjoyment, &c., except so far as it might be controlled by some express covenant in the same deed (*n*); but (so far at least as regards the words “grant” and “give”) the law on this head is now altered: it being enacted by 8 & 9 Vict. c. 106, s. 4, that neither of those words in any deed executed after 1st October, 1845, shall imply any covenant, except so far as they may, by force of any *Act of Parliament*, imply a covenant (*o*). A covenant in any deed gives to the covenantee and his representatives, in case of its breach, a right of action for damages against the covenantor and his representatives; and in a deed of *conveyance*, a covenant directly relating to the land conveyed will also, in general, *run with the land*; that is, not only will the original parties or their

(*m*) 6 Edw. 1, c. 3; 11 Hen. 7, c. 20; 4 & 5 Ann. c. 3, s. 21; 3 & 4 Will. 4, c. 27, s. 39; c. 74, s. 14.

(*n*) Cro. Eliz. 674; Merrill v. Frame, 4 Taunt. 319; Baber v. Harris, 9 Ad. & El. 532.

(*o*) 8 & 9 Vict. c. 18, s. 132.

representatives be, but each successive owner of the land will be, entitled to its benefit, or liable (as the case may be) to its obligation (*p*). It is consequently usual, so far as covenants for title are concerned, for a person who sells land which he himself bought, to covenant only against his own acts; or if he did not acquire it in that method, then to extend the covenant as far back as to the acts of the last buyer, but no further: and this is a sufficient security to the vendee, where all former vendors have entered into a similar covenant; because all these engagements run with the land, and consequently operate for his protection (*q*). However, in the case of a mortgage, the mortgagor's covenants for title are not so limited, but are absolute; and this distinction between the covenants of a vendor and a mortgagor is preserved in the Conveyancing Act, 1881 (*r*), s. 7, by the effect of which, if the parties are expressed to convey respectively as beneficial owner and as mortgagor, the covenants for title are implied (*s*); and the benefit of all such implied covenants runs with the land conveyed.

8. [Lastly, comes the *conclusion*, which mentions the execution and date of the deed, or the time of its being given or executed; but a deed is good, although it mention no date, or hath a false date; or even an impossible date, as the 30th of February: provided the real day of its execution can be proved (*t*).

A fourth requisite to a deed is the *reading* of the deed, which is necessary, wherever any one of the parties desires

(*p*) Co. Litt. 384 b, 385 a; Shep. Touch. 161; Spencer's case, 5 Rep. 16 a; Vyvian v. Arthur, 1 Barn. & Cress. 410; Wilson v. Hart, Law Rep., 1 Ch. App. 463; Haywood v. Brunswick Building Society, 8 Q. B. D. 403; Austerberry v. Oldham (Corporation), 29 Ch. Div. 750.

(*q*) Browning v. Wright, 2 Bos. & Pul. 22.

(*r*) 44 & 45 Vict. c. 41.

(*s*) Page v. Midland Rail. Co., 1894, 1 Ch. 11.

(*t*) Co. Litt. 46 b; Dyer, 28; Styles v. Wardle, 4 Barn. & Cress. 908.

[it, but not otherwise; and if it be not done on request, the deed is void as to him (*u*). If he can, he should read it himself; if he be blind or illiterate, another must read it to him. If it be read falsely, it will be void; unless, indeed, it be so read by collusion on purpose to make it void, in which case it will be good (*x*).

A fifth requisite to a deed is, that the party, whose deed it is, should *seal* it (*y*), and now in most cases should *sign* it also. The use of seals is extremely antient. We read of it among the Jews and Persians, in the earliest and most sacred records of history (*z*); and in the book of Jeremiah there is a very remarkable instance, not only of an attestation by seal, but also of the other usual formalities attending a Jewish purchase (*a*). In the civil law, also, seals were required, on the part of the witnesses at least, at the attestation of every testament (*b*). But in the times of our Saxon ancestors, they were not much in use in England (*c*). For though Sir Edward Coke relies on an instance of King Edwin's making use of a seal about an hundred years before the Conquest, yet it does not follow that this was the usage among the whole nation (*d*); and perhaps the charter he mentions may be of doubtful authority from this very circumstance of being sealed; since we are assured by all our antient historians, that sealing was not then in common use. The method of the Saxons was for such as could write, to subscribe their names; and

(*u*) *Rex v. Longman*, 1 Nev. & M. 576.

(*x*) *Manser's case*, 2 Rep. 3; *Thoroughgood's case*, 2 Rep. 9; *Pigot's case*, 11 Rep. 27.

(*y*) Merely placing the finger on a seal or wafer already attached, is equivalent to sealing, and is the usual practice (*Shep. Touch.* 57); and there is indeed no necessity that there should be either wax

or wafer, if only an impression be made on the parchment or paper, with the *intent* of sealing it. (*The Queen v. Trustees of Covent Garden*, 7 Q. B. 238, n.)

(*z*) 1 Kings, c. 21; Daniel, c. 6; Esther, c. 8.

(*a*) Jer. c. 32.

(*b*) Inst. 2, 10, 2 and 3.

(*c*) Palgrave, Eng. Com. ccxv.

(*d*) Co. Litt. 7 a.

[whether they could write or not, to affix the sign of the cross; which custom our illiterate vulgar do, for the most part, to this day keep up, by signing a cross for their mark, when unable to write their names. And indeed this inability to write, and therefore making a cross in its stead, is honestly avowed by Caedwalla, a Saxon king, at the end of one of his charters (*e*). In like manner, and for the same unsurmountable reason, the Normans, (a brave but illiterate nation,) at their first settlement in France, used the practice of sealing only, without writing their names: which custom continued, when learning made its way among them, though the reason for doing it had ceased; and hence the charter of Edward the Confessor to Westminster Abbey,—himself being brought up in Normandy,—was witnessed only by his seal; and is generally thought to be the oldest sealed charter of any authenticity in England (*f*). At the Conquest, the Norman lords brought over into this kingdom their own fashions; and introduced waxen seals only, instead of the English method of writing their names, and signing with the sign of the cross (*g*). And in the reign of Edward the first, every freeman, and even such of the more substantial villeins as were fit to be put upon juries, had their distinct particular seals (*h*). The impressions of these seals were sometimes a knight on horseback, sometimes other devices; but coats of arms were not introduced into seals, nor indeed into any other use, till about the reign of Richard the first, who brought them from the crusade in the Holy Land; where they were first invented and

(*e*) "*Propriâ manu, pro ignorantia literarum, signum sanctæ crucis expressi et subscripsi.*" (Seld. Jan. Ang. l. 1, § 42.) And this (according to Procopius) the Emperor Justin in the East, and Theodoric King of the Goths in Italy, had before authorized by their example, on account of their inability to

write.

(*f*) Lamb. Archeion, 51.

(*g*) "*Normanni chirographorum confectionem, cum crucibus aureis, aliisque signaculis sacris, in Angliâ firmari solitam, in cæram impressam mutant, modumque scribendi Anglicum rejiciunt.*"—Ingulph.

(*h*) Stat. Exon. 14 Edw. 1.

[painted on the shields of the knights, to distinguish the variety of persons of every Christian nation who resorted thither, and who could not, when clad in complete steel, be otherwise known or ascertained.

This neglect of signing, and resting only upon the authenticity of seals, remained very long among us; for it was held in all our books that sealing alone was sufficient to authenticate a deed; and so the common form of attesting deeds,—“*sealed and delivered*,”—continues to this day. The Statute of Frauds, however, (29 Car. II. c. 3,) revives the Saxon custom, and expressly directs the signing, in all grants of lands, and many other species of deeds: in which therefore signing seems to be now as necessary as sealing, though it hath been sometimes held that the one includes the other (*i*).

A sixth requisite to a deed is, that it be *delivered* by the party himself or by his certain attorney; which therefore is also expressed in the attestation, “sealed and *delivered*,” and, in practice, both sealing and delivering is held to be performed by placing the finger on the seal or wafer, at the same time uttering the words “I deliver this as my act and deed” (*k*). A deed takes effect only from this delivery; for if the date be false or impossible, the delivery ascertains the time of it; and if another person seals the deed, yet if the party delivers it himself, he thereby adopts the sealing (*l*). Moreover, a delivery may be either absolute, that is, to the party or grantee himself: or to a third person, to hold till some condition be performed on the part of the grantee: in which last case it is delivered not as a *deed*, but as an *escrow*; that is, as a scroll or writing, which is not to take effect as a deed till the condition be performed; and then it is a deed to all

(*i*) 2 Bl. Com. 306; 1 Shep. Touch. by Preston, 56; Cooch v. Goodman, 2 Q. B. 580, 597.

(*k*) Talbot v. Hodson, 7 Taunt.

251; Fletcher v. Fletcher, 4 Hare, 67; Doe d. Richards v. Lewis, 11 C. B. 1046.

(*l*) Perk. § 130.

[intents and purposes (*m*), and operates as from the date of the sealing and delivery (*n*).

Finally, a deed must in general be duly *attested*, that is, must show that it was executed by the party *in the presence of a witness or witnesses*: though this is necessary, rather for preserving the evidence, than for constituting the essence of the deed. Our modern deeds are in reality nothing more than an improvement or amplification of the *brevia testata* mentioned by the feudal writers; which were written memorandums introduced to perpetuate the tenor of the conveyance and investiture (*o*). With this view they registered in the deed the persons who attended as witnesses, which was formerly done without their signing their names (that not being always in their power), but they only heard the deed read; and then the clerk or scribe added their names, in a sort of memorandum, thus: "*hiis testibus Johanne Moore, Jacobo Smith, et aliis ad hanc rem convocatis*" (*p*). This, like all other solemn transactions, was originally done only *coram paribus* (*q*), and frequently when assembled in the court baron, hundred court, or old county court; which was then expressed in the attestation, *teste comitatu, hundredo, &c.* (*r*). Afterwards the attestation of other witnesses was allowed; the trial, in case of a dispute, being still reserved to the *pares*; with whom the witnesses (if more than one) were associated and joined in the verdict (*s*); till that also was abrogated by the statute of York, 12 Edw. II. c. 2. And in this manner, with some such clause of *hiis testibus*, are all old deeds and charters, particularly *Magna Charta*, witnessed. And in the time of Sir Edward Coke, creations of nobility

(*m*) Co. Litt. 36 a; *Millership v. Brookes*, 5 H. & N. 797; *Kidner v. Keith*, 15 C. B. (N. S.) 35; *Watkins v. Nash*, Law Rep., 20 Eq. Ca. 262.

(*n*) *Frosel v. Walsh*, Bridg. Rep. 51; *Graham v. Graham*, 1 Ves.

jun. 274.

(*o*) Feud. 1. 1, t. 4.

(*p*) Co. Litt. 6 a.

(*q*) Feud. 1. 2, t. 32.

(*r*) Spelm. Gloss. 228; *Madox*, Formul. Nos. 21, 322, 660.

(*s*) Co. Litt. 6 b.

[were still witnessed in the same manner (*t*). But in the sovereign's common charters, writs, or letters-patent, the style is now altered: for at present the letters-patent are attested thus: "*teste meipso*, witness ourself at Westminster, &c.," a form which was introduced by Richard the first, but not commonly used till about the beginning of the fifteenth century (*u*). Nor was the clause of *hiiis testibus* entirely discontinued in royal grants till the reign of Henry the eighth (*x*); which was also the era of discontinuing it in the deeds of subjects,—learning being then revived, and the faculty of writing more general; and therefore ever since that time the witnesses have usually subscribed their attestations, either at the bottom or on the back of the deed (*y*).

III. How a deed may be avoided, or rendered of no effect.—And from what has been before laid down, it will follow that if there be wanting any of the essential requisites before mentioned: viz. 1, Proper parties, and a proper subject matter; 2, Writing on paper or parchment; 3, Sufficient and legal words, properly disposed; 4, Reading, (if desired) before the execution; 5, Sealing, and by the Statute of Frauds, in most cases, signing also; and, 6, Delivery—the instrument is a void deed *ab initio*. It may also be avoided by matter *ex post facto*: as, 1. By rasure, interlining, or other alteration in any material part; unless indeed a memorandum thereof, properly attested, be made (and it will *primâ facie* be assumed to have been made) prior to the execution of the deed itself (*z*). 2. By breaking off or defacing the seal (*a*). 3. By delivering it up to be cancelled, that is, to have lines drawn over it in the form of lattice-work or *cancelli*; though the phrase is

(*t*) 2 Inst. 77.

(*u*) Madox, Formul. No. 515.

(*x*) Madox, Dissert. fol. 32.

(*y*) 2 Inst. 78.

(*z*) Com. Dig. Fait (F. 1); Pigot's

case, 11 Rep. 27; Davidson *v.* Cooper, 13 Mee. & W. 343; Tatham *v.* Cattamore, 20 L. J., Q. B. 364.

(*a*) Matthewson's case, 5 Rep. 23.

[now used figuratively for any manner of obliteration or defacement (*b*). 4. By the disagreement of those whose concurrence is necessary in order for the deed to stand; as of the husband, where a married woman is concerned; or of an infant or person under duress, when those disabilities are removed; and the like.

Deeds are also in some cases avoided by objections relating to the *consideration* on which they are founded, or to their want of consideration. And regarding the consideration of a deed, that may be either a *good* or a *valuable* one,—a good consideration being such as blood or natural love and affection, as where a man grants an estate to a near relation from motives of generosity, prudence, and natural duty: and a valuable consideration being such as money, marriage, or the like, which the law esteems an equivalent given for the grant (*c*).] Deeds made without any consideration whatever, and also those made for good, though not for valuable, consideration, are said to be *voluntary*; and by force of the statute 27 Eliz. c. 4, voluntary deeds of lands were void as against subsequent *bonâ fide* purchasers (*d*) from the donor of such lands; but since the 56 & 57 Vict. c. 21, which came into force on the 29th June, 1893, such deeds if made without any actual fraudulent intent, although voluntary, are not now avoided by any such subsequent sale of the lands; but (by 13 Eliz. c. 5) such deeds, whether of lands or of goods, are and continue void as against creditors, where the grantor is indebted to such creditors at the time, to the extent of insolvency (*e*). So any deed is liable to be impeached if founded on an immoral or illegal considera-

(*b*) Vin. Abr. Faits (X. 2, 3, 4);
1 Shep. Touch. 70; Todd *v.* Emly,
11 Mee. & W. 4.

(*c*) Twyne's case, 3 Rep. 83; 2
Rol. Abr. 779; Palm. 214.

(*d*) Doe *v.* Manning, 9 East, 59;
Doe *d.* Richards *v.* Lewis, 11 C. B.

1035; In re Cameron and Wells,
37 Ch. Div. 32.

(*e*) Bac. Abr. Fraud (C); Spirett
v. Willows, 3 D. J. & S. 303;
Freeman *v.* Pope, Law Rep., 9
Eq. Ca. 206.

tion, or if obtained by fraud (*f*). But in general, the efficacy of a deed to bind the parties thereto will not be prevented by the mere *want* of consideration; for in this respect deeds are distinguished from simple contracts, that is, contracts not under seal; to the validity of which some consideration is essential: but a writing sealed and delivered as a deed, is supposed by the law to be made with due deliberation; and to express fully and absolutely the intention of the party by whom it is executed: and he is therefore bound by its execution, whether he received a consideration for that which it comprises, or not (*g*); but by a *release*, a party may be discharged from the obligations even of a valid deed, such release being itself by deed (*h*).

IV. The construction of deeds.—The rules relative to the construction of deeds are principally as follows:—

1. A deed is to be expounded according to the intention, where the intention is clear, rather than according to the precise words used (*i*). For “*verba intentioni debent inseruire* ;” and “*qui hæret in literâ, hæret in cortice*.” [Therefore by a grant of a remainder, a reversion may well pass, and *è converso* (*k*). And upon a similar principle, it is a maxim that “*mala grammatica non vitiât chartam*,” neither false English nor bad Latin will destroy a deed (*l*).]

2. To explain an ambiguity in the language of a deed, no evidence *dehors* the deed itself is admissible (*m*), *scilicet*, where the doubt arises merely from the failure of the parties to express their own meaning in proper terms; for if the law allowed the difficulty in such a case to be

(*f*) *Collins v. Blantern*, 2 Wils. 341.

(*g*) *Bac. Read. Uses*, p. 79; *Irons v. Smallpiece*, 2 Barn. & Ald. 554; *Pratt v. Barker*, 4 Russ. 507; *Hall v. Hall*, L. R., 8 Ch. App. 430; *Henry v. Armstrong*, 18 Ch. D. 668.

(*h*) *West v. Blakeway*, 2 Man. & Gr. 729.

(*i*) *Chapman v. Dalton*, Plowd. 289; *Hasker v. Sutton*, 1 Bing. 500.

(*k*) *Hob.* 27.

(*l*) *Osborn's case*, 10 Rep. 133.

(*m*) *Bac. Max. Reg.* 23; *Higgins v. Senior*, 8 Mee. & W. 844.

removed by extraneous evidence, it would render precision of less importance, and introduce inconvenient laxity into the structure of deeds in general. But here it is necessary to distinguish between *patent* and *latent* ambiguities (*n*), the first being where the doubt arises upon the face of the instrument itself, and to these the rule applies; the second being where the doubt is introduced by the existence of a fact not apparent on the face of the deed, and to these the rule has no application: the reason for which seems to be, that where the ambiguity itself is produced by circumstances extraneous to the deed, its explanation must of necessity be sought for through the same medium; and so also, and for the same reason, evidence of usage *dehors* the deed is admissible for its due construction (*o*).

3. The construction of a deed should be made upon the entire instrument, and so as to give effect, as far as possible, to every word that it contains (*p*).

4. [The construction should be *favourable*, and such that "*res magis valeat quam pereat*" (*q*). In connection apparently with which rule, it is also laid down, that if the words will bear two senses, one agreeable to and another against law, that sense shall be preferred which is most agreeable thereto (*r*). As if tenant in tail grants a lease by the common law to have and to hold during life generally, it shall be construed to be a lease for the lessor's own life only, for that stands with the common law; and not for the life of the lessee, which is beyond his common law power to grant.]

5. When any thing is granted, the means necessary for

(*n*) See 4 Cru. Dig. 425; 6 Cru. Dig. 165; Bac. Max. Reg. 23; Queen *v.* Wooldale, 6 Q. B. 549; Reffell *v.* Reffell, Law Rep., 1 P. & D. 139.

(*o*) Grant *v.* Maddox, 15 Mee. & W. 745; and as to ambiguities in a devise, see 5 Rep. 68 b; 2 Atk. 372; 2 P. Wms. 135; In re Wol-

verton Mortgage Estates, 7 Ch. D. 197.

(*p*) 2 Bl. Com. 379.

(*q*) Plowd. 156; Shep. Touch. 82, 83; Roe *v.* Tranmar, Willes, 682; Doe *d.* Lewis *v.* Davies, 2 Mee. & W. 516.

(*r*) Co. Litt. 42 a.

its enjoyment are also granted by implication; for it is a maxim that “*cuicumque aliquid conceditur, conceditur et id sine quo res ipsa esse non potuit*” (s). Thus, if a man conveys a piece of ground in the midst of his estate, a right of way to come to it, over the land not conveyed, will also pass to the grantee.

6. If there be two clauses in a deed so totally repugnant to each other that they cannot both stand together, the first shall be received, and the latter rejected (t),—the opposite rule being applicable in the case of wills (u).

7. [Ambiguous words shall be taken most strongly against the grantor, “*verba fortius accipiuntur contra proferentem*” (x); for men would always affect ambiguous and intricate expressions, if they were afterwards at liberty to put their own constructions upon them. But this rule does not apply to a grant by the Crown, at the suit of the grantee (y); also, the rule is never to be resorted to or relied upon, but where all other rules of exposition fail.]

(s) Co. Litt. 56 a; Shep. Touch. 89; Liford's case, 11 Rep. 52; Hinchliffe v. Kinnoul, 2 Bing. N. C. 24.

(t) 2 Bl. Com. 381; Shep. Touch. 88; Hard. 94; Doe d. Leicester, 2 Taunt. 113; Doe d. Spencer v.

Pedley, 1 Mee. & W. 677.

(u) See Co. Litt. 1126; Plowd. 541.

(x) Co. Litt. 36 a; Bac. Max. Reg. 3; 2 Bl. Com. 380; Doe v. Edwards, 1 Mee. & W. 556.

(y) Bac. Max. Reg. 3.

CHAPTER XVII.

OF ORDINARY CONVEYANCES—AND FIRST, OF THOSE AT
THE COMMON LAW.

THE branch of the law which relates to “*conveyances*,” otherwise called “*assurances*,” and which are the instruments of voluntary alienation, is in its own nature of great simplicity; and yet it involves considerations of a very complex and subtle kind, and has been elaborated into a very perfect system, known as the law of *conveyancing*, with its own separate body of practitioners, who are called *conveyancers* (*a*).

In the earlier times, and indeed down to the reign of Henry the eighth, the chief distinction between conveyances was this, that they were either by matter of *record* or by matter *in pais*; and those which were *in pais* were conveyances of the ordinary class transacted between two or more persons *in pais* (*i. e.*, in the country), according to the old common law, and upon the spot; while on the other hand, those which were matter of *record* were (as the name denotes) effected by assurances in the superior courts of justice (*b*). But in and subsequent to the reign just mentioned, various Acts of Parliament have successively been passed, the effect of which has been to introduce from time to time new classes of conveyances, deriving their force and authority from the particular statutes; and, in discussing the general subject of conveyances, it is neces-

(*a*) 44 Geo. 3, c. 98, s. 14; 23 &
24 Vict. c. 127, s. 34.

(*b*) 2 Bl. Com. 294.

sary to keep these distinctions in view, dividing conveyances, first, into conveyances of the *ordinary* kind, being in effect conveyances by matter *in pais*, and, secondly, into conveyances by *matter of record*; and the former class may be either conveyances at *common law*, or conveyances *by statute law*.

Firstly, conveyances at common law:—The first of these is *The Feoffment*.—This method of conveyance was for ages the only method in ordinary use by which our ancestors were wont to convey the freehold of land in possession; and we shall proceed now to give a somewhat fuller account of its nature and properties than its actual importance would seem to justify, it having now fallen, in great measure, into disuse, and having been almost entirely supplanted in fact by more modern forms of conveyance.

A feoffment, then, is derived from the verb to enfeoff, and is a method of alienation applicable for the purpose of conveying freehold estates in possession in corporeal hereditaments, and applicable to that purpose only (c). [This conveyance is itself no other than the antient feudal donation, the aptest word of feoffment being “*do*,” *give*, or “*dedi*,” *given* (d); and it is still governed by the same feudal rules; the old rule, “*tenor est qui legem dat feudo*,” which was applicable to the feudal grant being applicable also to the feoffment, for “*modus legem dat donationi*” (e). And therefore, as in pure feudal donations, the lord, from whom the feud moved, must have expressly limited and declared the continuance or quantity of estate which he meant to confer, “*ne quis plus donasse præsumatur, quam in donatione expresserit* ;” so, if one grants by feoffment lands or tenements to another, and limits or expresses no estate, the grantee or feoffee hath barely an estate for life (f); and it has

(c) A freehold reversion already created, if expectant on a particular estate for years, might also be transferred by feoffment, with the consent of the particular tenant,

but not otherwise. (Co. Litt. 48 b.)

(d) Co. Litt. 9 a.

(e) Wright's Ten. 21.

(f) Co. Litt. 42 a.

[therefore been the practice in all feoffments, from time immemorial, to limit, by express words, the nature of the estate intended to be conveyed.

But by the mere words of donation the feoffment was by no means perfected; there remained a very material ceremony to be performed, called *livery of seisin*, without which the transaction could not operate as a feoffment (*g*); and such is still the law when this mode of conveyance is used. This livery of seisin is no other than the pure feudal investiture, or delivery of the corporal possession of the land or tenement, which was held absolutely necessary to complete the donation. “*Nam feudum sine investiturâ nullo modo constitui potuit*” (*h*); and an estate was then only perfect in our law when, as the author of *Fleta* expresses it, “*fit juris et seisinæ conjunctio*” (*i*).

Investitures were probably intended to signify by some public and notorious act the transfer of the estate, so that such as claimed title by other means might know against whom to bring their actions; for in all well-governed nations, some notoriety of this kind has been ever held requisite, to acquire and to ascertain the property of lands. In the Roman law, *plenum dominium* required and combined both the *right* and the *corporal possession*, which possession again was acquired by the intention to possess, coupled with the actual taking of the possession (*k*); and the intention by itself was not sufficient. In like manner, in ecclesiastical promotions where the freehold passes to the person promoted, corporal possession is required even to this day to vest the property completely in the new proprietor; who, according to the distinction of the canonists, acquires the *jus ad rem*, or inchoate and imperfect right,

(*g*) Litt. s. 70.

(*h*) Wright's Ten. 37.

(*i*) L. 3, c. 15, s. 5.

(*k*) “*Nam apiscimur possessionem corpore et animo; neque per se corpore, neque per se animo. Non autem ita accipiendum est, ut qui fundum pos-*

sidere velit, omnes glebas circumambulet; sed sufficit quamlibet partem ejus fundi introire.”—Ff. 41, 2, 3.—

And again: “*traditionibus dominia rerum, non nudis pactis, transferuntur.*”—Cod. 2, 3, 20.

[by nomination and institution ; but not the *jus in re*, or complete and full right, until induction, *i.e.*, corporal possession (*l*). Therefore in ecclesiastical dignities, possession is given by “instalment” ; in rectories and vicarages, by “induction” ; without which no temporal rights accrue to the minister, though every ecclesiastical power is vested in him by institution.

The corporal tradition of lands being sometimes inconvenient, a symbolical delivery of possession was in many cases antiently allowed, by transferring something near at hand, in the presence of credible witnesses ; which, by agreement, should serve to represent the very thing designed to be conveyed. Among the Jews, we find in the book of Ruth that a man plucked off his shoe, and gave it to his neighbour (*m*) ; and among the antient Goths and Swedes, that the seller of land cast a clod into the extended cloak of the buyer, or delivered a staff or a wand (*n*). Thus, too, with our Saxon ancestors, the delivery of a turf was a necessary solemnity to establish the conveyance of lands (*o*).] And to this day, the conveyance of copyhold estates is usually made by the seller’s delivery of a rod or verge to the lord or his steward, who re-delivers the same to the purchaser.

Conveyances *in writing* were an improvement on this primitive mode of transfer. For the transaction, when depending on the remembrance and testimony of witnesses, was liable to be forgotten or misrepresented, and became frequently incapable of proof. Besides, the new occasions and necessities introduced by the advancement of commerce, required means to be devised of charging and encumbering estates, without an absolute sale thereof ; and of making them liable to a multitude of conditions and minute designations. Writings were consequently introduced, in order to specify and perpetuate the peculiar

(*l*) Decretal. l. 3, t. 4, c. 40.

(*m*) Ruth, ch. iv., v. 7.

(*n*) Stiernhook, de Jure Sueon.

l. 2, c. 4.

(*o*) Hickes, Dissert. Epistolar. 85.

purposes of the party who conveyed: and now, by the Statute of Frauds (29 Car. II. c. 3), s. 1, no estate created by livery of seisin only, and not in writing signed by the party, or his agent by writing lawfully authorized, shall be of any force except to constitute an estate at will. Since this statute, therefore, a feoffment has not been effectual unless evidenced by writing; though the transaction has been nevertheless considered as deriving its legal force from the livery, and not from the written instrument (*p*). And now, by 8 & 9 Vict. c. 106, s. 5, a feoffment made after 1st October, 1845, other than a feoffment made under a custom by an infant, shall be void at law unless evidenced *by deed*; but in addition to the writing or deed, livery of seisin is still required to every valid feoffment.

[Livery of seisin is either “in deed” or “in law.” Livery in *deed* is thus performed. The feoffor, lessor, or his attorney for the purpose, together with the feoffee, lessee, or his attorney, come to the land, or to the house; and there, in the presence of witnesses, declare the contents of the feoffment or lease on which the livery is to be made. And then the feoffor, if it be of land, doth deliver to the feoffee (all other persons being out of the ground) a clod or turf, or a twig or bough there growing, with words to this effect: “I deliver these to you in the name of seisin of all the lands and tenements contained in this deed.” But if it be of a house, the feoffor must take the ring or latch of the door (the house being quite empty of people), and deliver it to the feoffee in the same form: and then the feoffee must enter alone, and shut to the door, and then open it, and let in the others (*q*). And in all these cases it is prudent and usual to indorse the livery of seisin on the back of the deed, specifying the manner, place, and time of making it, together with the names of the witnesses (*r*). And thus much for livery in deed.

(*p*) Co. Litt. 48 a.

(*q*) Co. Litt. 48 a; West. Symb. 251.

(*r*) *Roe v. Rashleigh*, 3 Barn. & Ald. 156; *Doe v. Taylor*, 2 Nev. & M. 508.

[Livery in *law* is where the same is not made on the land, but in sight of it only; the feoffor saying to the feoffee, "I give you yonder land, enter and take possession." Here, if the feoffee enters during the life of the feoffor, it is a good livery, but not otherwise.] By the antient law, indeed, if he dared not enter through fear of his life or bodily harm, his *continual claim*—made yearly in due form—would suffice without an entry (*s*); but this has been altered by 3 & 4 Will. IV. c. 27, s. 11, which provides that no right of entry or action shall in future be preserved by *continual claim*. Livery in law cannot be given or received by attorney, but only by the parties themselves (*t*).

By feoffment, not only a fee simple may be conveyed, but an estate tail or an estate for life, these being all estates of freehold. But the term "feoffment" is considered as importing more properly a conveyance of the *fee simple*; while the conveyance of an *estate tail* is more technically called a *gift*; and that of an estate for life, a *demise* or *lease* (*u*).

Up to a recent period the feoffment was distinguished from other conveyances by the following peculiarity, namely, that when made by a person in actual possession, it would always have the effect of passing to the feoffee a freehold, either by right or by wrong. For it was a delivery of the actual seisin, that is, of the actual possession, as for an estate of freehold, in fee, in tail, or for life; so that if the feoffor was himself lawfully seised to the full extent of the estate that he conveyed, a freehold as of right would pass; but if he was not lawfully seised, or not lawfully seised to that extent, a freehold would still pass, though a freehold by *wrong* (*x*). And when by such

(*s*) Litt. s. 421; Co. Litt. 48 b;
2 Inst. 483.

(*t*) Co. Litt. 52 b.

(*u*) Litt. s. 59; Co. Litt. 9 a.

(*x*) Litt. ss. 599, 611; Co. Litt.
367 a; Fernor's case, 3 Rep. 77;
Taylor v. Horde, 1 Burr. 60; Co.
Litt. by Butl. 330 b, n. (1); 2
Sand. Us. pp. 18, 20.

means, or by any other, a wrongful or tortious freehold was created, the effect was, that the person lawfully entitled to the freehold in possession was *disseised*; and if there were any persons in reversion or remainder, such reversion or remainder was *displaced or divested*, so that each of these parties ceased to retain (strictly speaking) an estate; though each nevertheless possessed a *right of entry*; that is, was entitled, in his proper turn, to enter, and eject the wrong-doer, and thus to revest his own estate (*y*); and when the tortious feoffment was by a tenant in tail in possession, the effect was a *discontinuance*, which deprived both the issue and the remainderman or reversioner even of their right of entry, leaving them nothing but a right of action (*z*); but by 3 & 4 Will. IV. c. 27, s. 39, this particular effect was taken away. However, all this doctrine, *so far as regards the operation of a feoffment by wrong*, is now abolished by the provision of 8 & 9 Vict. c. 106, s. 4, that “a feoffment made after the 1st October, 1845, shall not have any *tortious* operation.”

II. The second mode of conveyance by the common law is *The Grant*. A grant is effected by mere deed, without livery of seisin, the deed containing words expressive of the intention to convey, the appropriate words being “*dedi et concessi*,” “have given and granted,” but they may be supplied by others of the like import (*a*). This was the regular method, by the common law, of transferring estates in expectancy (that is, reversions and remainders) in corporeal hereditaments, as feoffment was of transferring freehold estates in possession (*b*); and the grant was appropriate also to the transfer (for whatever estate) of hereditaments purely incorporeal—such as advowsons, commons, rents, and the like,—of which we are to treat hereafter. For it obviously results from the

(*y*) Co. Litt. 251 a, b, 327 b; 1 Saund. by Wms. 319, n. (1); Focus v. Salisbury, Hard. 401, 402.

(*z*) Co. Litt. 327 b.

(*a*) 2 Sand. Us. 47.

(*b*) Co. Litt. 172 a, 332 a, b.

nature both of things incorporeal, and of corporeal things in expectancy, that no livery can be made of them: not of the first, because they are not capable of possession; nor of the last, because the possession is in the particular tenant, and not in the grantor. For which reason they were formerly said *to lie in grant*; while corporeal hereditaments in possession were said to *lie in livery* (c); and as the latter passed by force of the livery of seisin, so the former passed by force of the deed. But the conveyance by grant is now made applicable to all kinds of hereditaments; for by 8 & 9 Vict. c. 106, s. 2, it is enacted, that, “after the 1st October, 1845, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery”; and, indeed, the use of the word *grant* is no longer necessary in any conveyance, the word *convey* being now made a sufficient equivalent in all cases (d). It is also to be remarked under this head, that by the antient law, besides the grant itself, an additional ceremony was required where a reversion or remainder was the subject of transfer; viz. the *attornment* of the tenant of the particular estate to the grantee (e); but by the statute 4 & 5 Anne, c. 3, this requisite was dispensed with (f).

III. A Lease (or “demise”) is the third mode of conveyance by the common law.—A lease is a conveyance by which a man grants lands or tenements (usually with the reservation of a rent) to another, for life, for years, or at will (g), such estate being short of the lessor’s own interest therein (h); for if it be to the full extent of that interest, it is then properly an “assignment,” and no lease (i); and

(c) 2 Rep. 31 b; Doe v. Cole, 7 Barn. & Cress. 243.

(d) 44 & 45 Vict. c. 41, s. 49.

(e) Litt. ss. 568, 569; Doe v. Finch, 4 Barn. & Adol. 303.

(f) Doe d. Agar v. Brown, 2 El. & Bl. 331.

(g) Litt. s. 58.

(h) Co. Litt. 43 b; and Bac. Abr. “Leases and Terms of Years.”

(i) 2 Bl. Com. 317.

the lease, if for *years*, may be granted *in futuro* (*k*). A lease of land for life, being a freehold interest, could not be constituted by the common law without livery of seisin; and therefore the lease could, in such case, be only by way of feoffment (*l*); but if the estate were for years, or at will, no livery was required (*m*): nor was a deed, or even any writing, formerly essential to the efficacy of a demise of land for whatever period, unless, indeed, of an incorporeal hereditament (*n*). The law, however, on this subject has been altered; for by the Statute of Frauds, (29 Car. II. c. 3,) ss. 1, 2, all leases whatever, with the exception of those not exceeding three years and with a rent of not less than two-thirds of the improved annual value, must have been put into writing and signed by the lessor or his agent lawfully authorized in writing; and, by the statute of 8 & 9 Vict. c. 106, (sect. 3,) a lease, required by law to be in writing, of any tenements or hereditaments, made after 1st October, 1845, shall be void at law unless made *by deed* (*o*); but the lease will not vest in the lessee a complete estate, until he has made *entry* on the land demised, and in the meantime he takes but an *interesse termini*.

When the lease is for years only, the estate may (as we have seen) be granted to take effect in possession either immediately, or at some future time; and, in the latter case, the lessee has of course no right to enter until that future time has arrived. But it is important carefully to distinguish leases *in futuro* from mere *agreements to let*; for an intending lessor may, without using such words as actually to divest himself of any interest present or future, simply engage to grant a lease at a future period; and as no interest in the meantime passes, this will be a mere

(*k*) Co. Litt. 47 a; Bac. Abr. 716.

Leases (N.).

(*l*) Litt. s. 59.

(*m*) Ibid.

(*n*) Co. Litt. 49; Bird v. Higginson, 6 Ad. & El. 824; Rex v. Marquis of Salisbury, 8 Ad. & El.

(*o*) Parker v. Taswell, 27 L. J., Ch. 612; Walsh v. Lonsdale, 21 Ch. Div. 9; Martin v. Smith, Law Rep., 9 Exch. 50; Hand v. Hall, 2 Ex. D. 355.

agreement, and no lease (*p*); and with respect to such agreements, it is material to remark, that by 29 Car. II. c. 3, s. 4, they are required, even where the term agreed for is less than three years, to be in writing (*q*).

[The usual words of operation in a lease are “demise, grant, and to farm let,” *demisi concessi et ad firmam tradidi* (*r*). For *farm* or *feorme* is an old Saxon word signifying provisions (*s*); and it came to be used instead of rent or render, because antiently the greater part of rents were reserved in provisions—in corn, in poultry, and the like,—till the use of money became more frequent: so that a farmer, *firmarius*, was one who held his lands upon payment of a rent or feorme; though at present, by a gradual departure from the original sense, the word farm is brought to signify the very land so held upon farm or rent.] Neither the words “to farm let,” however, nor any of the others above specified, are necessary to effect a demise; any expressions sufficiently indicating the intention of one of the parties to divest himself of the possession, for a determinate period, in favour of the other, being clearly sufficient to constitute a lease (*t*). With reference to the covenants contained in a lease, we may here observe, that it results from what has been before stated as to such as *run with the land*, that the lessee is liable not only to the original landlord or reversioner, but in case of the grant of the reversion, then to the grantee also, for the future performance of all such covenants contained in the lease, on the part of the lessee; and is entitled, on the other hand, to enforce against the grantee, as well as the original landlord, the future performance of all such as are contained in the lease, on the part of the lessor (*u*). As to the covenants in a lease, it is also material

(*p*) Rollason *v.* Leon, 7 H. & N. 73.

(*s*) Spelm. Gloss. 229.

(*q*) Inman *v.* Stamp, 1 Starkie, N. P. C. 12; Edge *v.* Strafford, 1 Tyrw. 293.

(*t*) Bac. Abr. Leases, &c.; Poole *v.* Bentley, 13 East, 168.

(*r*) Co. Litt. 45 b.

(*u*) Thursby *v.* Plant, 1 Saund. by Wms. 230 b; Wright *v.* Burroughes, 3 C. B. 344.

to notice, that, to improve the landlord's security, the lease usually contains a proviso that, on breach of any of the covenants by the tenant, the landlord shall be at liberty to *re-enter*, and resume and hold possession of the premises as if no lease of them had ever been made; and this proviso constitutes, in case of a breach of covenant by the tenant, a most advantageous addition to the landlord's remedies, which would otherwise be confined to a right of action for damages on the covenant; but landlords now pursue their remedies under this proviso, subject to (and first complying with) the provisions in this behalf contained in the Conveyancing Act, 1881, hereinafter more particularly dealt with; and regarding these provisions, it will be sufficient to mention here, that they are intended for the relief of lessees upon equitable terms; and we may perhaps here usefully refer also to the Agricultural Holdings Act, 1875 (38 & 39 Vict. c. 92), repealed, but re-enacted with amendments by the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), by the provisions of which certain further relief has been provided for lessees; but these provisions also will be more properly considered hereafter.

IV. [An Exchange is the fourth conveyance by the common law, and is a mutual grant of equal interests, the one in consideration of the other. The word "exchange" is so individually requisite and appropriated by law to this case, that it cannot be supplied by any other word or expressed by any circumlocution (*x*). The estates exchanged must be equal in quantity, not of value (for that is immaterial), but of *interest*—as fee simple for fee simple, a lease for years for another lease for years, and the like (*y*). And no livery, even in exchanges of freehold, was, at the common law, necessary to perfect the conveyance (*z*); for each party stood in the place of the

(*x*) Co. Litt. 50, 51; Eton College *v.* Bishop of Winchester, 3 Wils. 468.

(*y*) Litt. ss. 64, 65; Perk. sect. 275; 2 Shep. Touch. 296.

(*z*) Litt. s. 62.

[other, and occupied his right, and each of them had already had corporal possession of his own land.] On the other hand, by the Statute of Frauds, (29 Car. II. c. 3,) ss. 1, 3, an exchange was required to be in writing; and by the statute 8 & 9 Vict. c. 106, s. 3, it must now be by deed, in every case except that of an exchange of copyhold. [Moreover, by the common law, entry must have been made on both sides; for if either party died before entry, the exchange was void for want of sufficient notoriety (*a*). And it was held, that if two parsons, by consent of patron and ordinary, exchanged their preferments, and the one was presented, instituted, and inducted, and the other was presented and instituted, but died before induction,—the former should not keep his new benefice, because the exchange was not completed, and therefore he must return back to his own (*b*). Formerly, also, if after an exchange of lands or other hereditaments, either party was evicted of those which were taken by him in exchange, through defect of the other's title, the party evicted had a right to return back to the possession of his own, by virtue of the implied warranty contained in all exchanges;] but this doctrine seems now to be abrogated by the provision of 8 & 9 Vict. c. 106, s. 4, whereby it is enacted, that an exchange of any tenements or hereditaments made by deed executed after 1st October, 1845, shall not imply any condition in law; and it may be necessary to here warn the reader that it is no exchange by the common law, where the parties execute *mutual conveyances* of their respective lands, the one to the other, and that the doctrines above laid down, as to *exchanges*, have no application to any such mutual conveyances (*c*); still less do they apply to the exchanges effected under Inclosure Acts (*d*).

(*a*) Co. Litt. 51 b.

Winchester, 3 Wils. 491.

(*b*) Perk. s. 288; Downes v. Craig, 9 Mee. & W. 166.

(*d*) 8 & 9 Vict. c. 118, ss. 92, 147; 9 & 10 Vict. c. 70; 10 & 11

(*c*) Eton College v. Bishop of

Vict. c. 111; 11 & 12 Vict. c. 99;

V. [A partition is the fifth mode of conveyance by the common law, and is where two or more joint-tenants, coparceners, or tenants in common, agree to divide the lands so held among them and thereafter to hold in severalty, each taking a distinct part (*e*). Here, as they all originally hold *pro indiviso*, it is necessary that they shall all mutually convey and assure to each other the several estates, which they are to take and enjoy separately.] By the common law, coparceners might make partition by parol only, accompanied by livery; but joint-tenants and tenants in common could not make it otherwise than by deed; though it would appear that, if perfected by livery, such deed did not require to be signed (*f*). However, under the Statute of Frauds (29 Car. II. c. 3), an instrument in writing, signed by the party or his agent, was made necessary in every case of partition by way of agreement (*g*); and by the statute 8 & 9 Vict. c. 106, s. 3, partitions of all hereditaments (not being copyhold) made after 1st October, 1845, shall be void at law, unless made not only in writing, but by deed; and (by sect. 4) such partitions do not now imply any condition in law.

The common law conveyances which have been hitherto considered, are all of a *primary* or *original* character; those which remain are of a *secondary* or *derivative* sort, which presuppose some precedent conveyance, and which only serve to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance. As,—

VI. A Release; which may be defined as a conveyance of an ulterior interest in lands or tenements to a particular tenant, or of an undivided share therein to a co-tenant,

12 & 13 Vict. c. 83; 14 & 15 Vict. (*f*) 2 Bl. Com. 324.

c. 53; 15 & 16 Vict. c. 79; 17 & (*g*) Co. Litt. by Harg. 169 a,

18 Vict. c. 97; 22 & 23 Vict. c. 43. n. (4).

(*e*) Co. Litt. 165 b.

(the relessee being in either case in privity of estate with the relessor,)—or of the right to such lands or tenements, to a person wrongfully in possession thereof (*h*). It was always effected without livery of seisin, even though the interest conveyed were freehold; for the doctrine of release is founded on this principle, that though the freehold in possession could not pass at common law without livery, yet where another person was already in the possession, the reason and propriety of that ceremony failed; and the grantor might consequently convey such right or interest as he had by mere deed (*i*). A deed, however, is essential to the efficacy of this conveyance (*k*); and the proper operative word to be employed in it is that of “*release*.” The release of a right may, of course, not only be *express*, but may also be *implied by law* from circumstances; and when it is of this latter kind, it may take place without a deed (*l*).

A release may enure in several ways, being principally five, namely:—

(1.) [By way of enlarging an estate, or *enlarger l'estate*; which is the species of release that most frequently occurs; and it consists of a conveyance of the ulterior interest of the remainderman or reversioner to the prior particular tenant: as if there be tenant for life or years, remainder to another in fee, and he in remainder releases all his right to the particular tenant and his heirs, this gives him the estate in fee. But to the validity of such releases as these, it is necessary that the estate of the relessee should be a *complete and vested* one (*m*); for if there be lessee for years, and, before he enters and is in possession, the lessor releases to him all his right in the reversion, such release is void; and this because the lessee has, in such case, a mere *interesse termini*, and not an estate upon

(*h*) Co. Litt. 264 a; Hist. Eng. Law, by Reeves, vol. iii. p. 354.

(*i*) 2 Bl. Com. 325; Gilb. Ten. 53.

(*k*) Co. Litt. 264 b.

(*l*) Ibid.

(*m*) Co. Litt. by Butl. 270 a, n. (3).

[which a reversion can properly be expectant]; or, as is observed by Lord Coke (*n*), “before entry the lessee has but *interesse termini*; and therefore a release, which enures by way of enlarging an estate, cannot work without a possession: for before possession, there is no reversion. But if a man make a lease for years, with remainder for years, and the first lessee doth enter, a release to him in the remainder for years is good to enlarge his estate.” And further, there must be a *privity of estate* between the relessor and relessee; that is, the one of their estates must be so related to the other as to make but one and the same estate at law: as in the case where the ulterior estate conveyed is a reversion or remainder mediately or immediately expectant upon the particular estate of the relessee; all which, in contemplation of law, form parts of the same estate, as being derived, at the same time, out of the same original seisin (*o*). Thus, if a man seised in fee make a lease for years, with remainder over for life, a release to the lessee for years is good; for he hath both a privity and an estate; and a release to him in the remainder for life is good also (*p*). But if A. makes a lease to B. for life, and B. makes a lease for years: and afterwards A. releases to the tenant for years, this release is void to enlarge his estate, because there is no privity between A. and the lessee for years (*q*). Upon the same principle a release to a tenant at will is good, because he has a sufficient estate for the purpose, and a privity with the lessor; but a release to a tenant at sufferance is void, because he has a possession without privity (*r*).

(2.) [A release may enure by way of passing an estate, or *mitter l'estate*; as where one of two coparceners releases all her right to the other, this passeth the fee simple of the

(*n*) Co. Litt. 270 a, 270 b.

602.

(*o*) 2 Prest. Conv. 324; 2 Bl. Com. 325; Gilb. Ten. 70, 71; Goodright v. Forrester, 1 Taunt.

(*p*) Co. Litt. 273 a.

(*q*) Ibid. 272 b.

(*r*) Ibid. 270 b.

[whole (*s*) ; or where one joint tenant releases to the other or others. But in this species of release, as well as in the former, there must be a privity of estate between the releasor and releesee (*t*) ; and therefore one tenant in common cannot release to his companion, because they have distinct freeholds, and there is no necessary unity of title between them (*u*).

(3.) A release may enure by way of *passing a right*, or *mitter le droit* ; as if a man be disseised, and releaseth to his disseisor all his right ; hereby the disseisor acquires a new right, which changes the quality of his estate, and renders that lawful which before was tortious or wrongful (*x*).

(4.) A release may enure by way of *extinguishment* ; as if my tenant for life makes a lease to A. for life, remainder to B. and his heirs, and I release to A. ; this extinguishes my right to the reversion, and shall enure to the advantage of B.'s remainder as well as of A.'s particular estate (*y*).

(5.) A release may enure by way of *entry and feoffment* ; as if there be two joint disseisors, and the disseisee releases to one of them, he shall be sole seised, and shall keep out his former companion ; which is the same in effect as if the disseisee had entered, and thereby put an end to the disseisin, and afterwards had enfeoffed one of the disseisors in fee (*z*).]

And here we may observe, with respect to the four last species of release, that the fee may be conveyed by any of them without the use of words of inheritance (*a*) : in which respect they differ from releases to enlarge the estate ; and indeed from feoffments also, and from grants ; for as to all these, it is a general rule (though subject to exception

(*s*) Co. Litt. 273.

(*t*) 2 Bl. Com. 325 ; Co. Litt. 273 b.

(*u*) Co. Litt. 200 b ; Gilb. Ten. 74 ; vide sup. p. 340.

(*x*) Litt. s. 466.

(*y*) Ibid. s. 470.

(*z*) Co. Litt. 278 a.

(*a*) Ibid. 9 b,

in particular cases) that an estate of inheritance cannot be created without the word *heirs* (*b*), or the phrase *heirs of the body*, or, since the Conveyancing Act, 1881 (*c*), the equivalent words “in fee simple” or “in fee tail.”

VII. [A Confirmation is of a nature nearly allied to a release (*d*). Sir Edward Coke defines it to be a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased (*e*); and the words of making it are these, “have given, granted, ratified, approved, and confirmed” (*f*). An instance of the first branch of the definition is, if tenant for life leaseth for forty years, and dieth during that term; here the lease for years is voidable by him in reversion; yet if he hath confirmed the estate of the lessee for years, *before the death of the tenant for life*, it is no longer voidable but sure (*g*). The latter branch, or that which tends to the increase of a particular estate, is the same in all respects with that species of release which operates by way of enlargement.] And it is to be observed that a confirmation (like a release, and for the same reason) has always been effectual without livery of seisin, even though a freehold estate be the subject (*h*). Moreover, a deed is essential to the validity of a conveyance of this kind (*i*); though there may be a confirmation *implied by law* from circumstances, as well as a confirmation by deed (*k*).

VIII. [A Surrender, (*sursum redditio*, or rendering up,) is of a nature directly opposite to a release; for as that

(*b*) Litt. s. 1; Co. Litt. 8 b.

(*c*) 44 & 45 Vict. c. 41.

(*d*) Co. Litt. 295 b, 308 b; Hist. Eng. Law, by Reeves, vol. iii. pp. 354, 355.

(*e*) Co. Litt. 295 b.

(*f*) Litt. ss. 515, 531.

(*g*) Litt. s. 516.

(*h*) 2 Bl. Com. 326.

(*i*) Shep. Touch. by Preston, vol. ii. p. 312.

(*k*) Co. Litt. 295 b; Doe v. Jenkins, 5 Bing. 469; Jenkins v. Church, Cowp. 482; Doe v. Archer, 1 Bos. & Pul. 531.

[operates by the greater estate descending upon the less, a surrender is the falling of a less estate into a greater (*l*). It is defined as a yielding up of an estate for life or years to him that hath an immediate reversion or remainder; wherein the particular estate may merge or drown, by mutual agreement between them (*m*). And accordingly it is held, that the surrenderee must have such an estate, that the estate surrendered may be capable of merging in it; so that tenant for life cannot surrender to him in remainder for years (*n*). A surrender is done by these words, “hath surrendered, granted, and yielded up,” or the like (*o*). And though the estate surrendered be for life, there was not, at common law, any occasion for livery of seisin (*p*); for there is a privity of estate between the surrenderor and the surrenderee; the one’s particular estate and the other’s remainder are one and the same estate; and livery having been once made at the creation of it, there is no necessity for having it afterwards.] Nor was either a deed or other writing required, at common law, to effect the surrender of land (*q*). But by the Statute of Frauds (29 Car. II. c. 3), s. 3, no lease (except of copyhold) shall be surrendered otherwise than by deed or note in writing, signed by the party or his agent lawfully authorized by writing (*r*): though this provision did not prevent there being a surrender created without writing by *operation of law*; for a surrender, like a confirmation, may be implied by law from circumstances (*s*), *e.g.*, giving up a former lease (with the seals torn off it) to the landlord, in other words, the cancellation of the lease, would ordi-

(*l*) Co. Litt. 373 b.

(*m*) Co. Litt. 337 b; Burton v. Touch. ubi sup.
Barday, 7 Bing. 757.

(*n*) Perk. s. 589.

(*o*) 2 Roll. Ab. 497.

(*p*) Co. Litt. 338 a; Shep. Touch.
307; Sleigh v. Bateman, Cro. Eliz.
487.

(*q*) Co. Litt. ubi sup.; Shep.

(*r*) Roe v. Archbishop of York,
6 East, 86; Gore v. Wright, 8 Ad.
& El. 118.

(*s*) Shep. Touch. 301; Bac. Ab.
Leases (S.) 3; Nickells v. Ather-
stone, 10 Q. B. 944.

narily imply a surrender thereof (*t*). And now by the statute 8 & 9 Vict. c. 106 (s. 3), a surrender in writing of an interest in any tenement or hereditament,—not being a copyhold interest, and not being an interest which might by law have been created without writing,—made after the 1st October, 1845, shall be void at law unless made not only in writing but *by deed*. And note, that, upon a surrender, no entry is required to complete the title of the surrenderee, except for the purpose of bringing an action for any trespass committed; so that if a tenant for life or years surrender at a place off the land, to him in reversion, and the latter agree to it, he has the land in him without further ceremony (*u*). And as to the effect of this conveyance, we may also remark, that if a lessee for life or years make a lease for years, reserving rent, and then surrender his estate to his landlord, the estate for years made out of the estate so surrendered will continue notwithstanding the surrender; but the under-tenant at common law, was, by such surrender of the original lease, held discharged (in general) from the rent and other covenants of *his* lease; for the reversionary estate to which they were annexed ceased, on the surrender, to exist (*x*). And hence in the case of leases, surrendered for the purpose merely of being renewed, it was in the power of the under-lessees (by refusing to surrender, in their turn, notwithstanding they had covenanted to do so), greatly to prejudice their immediate landlords, the first lessees. But by the statute 4 Geo. II. c. 28, it was provided, in the particular case of a lease surrendered for the purpose of *renewal*, that the new lessee should (without a surrender of the under-lease) have the like remedy as to the rent and covenants, and the under-lessee should hold, as if the

(*t*) Doe *v.* Thomas, 9 Barn. & Cress. 288; Walker *v.* Richardson, 2 Mee. & W. 882; Lord Ward *v.* Lumley, 5 H. & N. 87, 656.

(*u*) Shep. Touchstone, 307, 308; Thompson *v.* Leach, 2 Vent. 198.

(*x*) Lord Treasurer *v.* Barton, Moore, 94; Webb *v.* Russell, 3 T. R. 402.

original lease had been kept on foot: and that the chief landlord should have the like remedy, by distress or entry on the lands and hereditaments comprised in such underlease, for the rents and duties reserved by the renewed lease (so far as they exceeded not those reserved by the original lease), as he would have had if such original lease had been kept on foot (*y*). Also, by 8 & 9 Vict. c. 106, (s. 9,) it is now provided more generally, that when the reversion expectant on a lease (made either before or after the passing of that Act) of any tenements or hereditaments of any tenure shall, after the 1st October, 1845, be surrendered or merge, the estate which shall, for the time being, confer as against the tenant under the same lease the next vested right to the same tenements or hereditaments, shall,—to the extent and for the purpose of preserving such incidents to, and obligations on, the same reversion, as, but for the surrender or merger thereof, would have subsisted,—be deemed the reversion expectant on the same lease.

IX. An Assignment of land or real estate is properly a transfer, or making over to another, of a person's whole interest therein, whatever that interest may be; but it is more particularly applied to express the transfer of an estate for life or years. And an assignment for life or years differs from a lease only in this, that by a lease a man grants an interest less than his own, reserving to himself a reversion; by an assignment, he parts with the whole property, and the assignee consequently stands in the place of the assignor (*z*). Thus where a lease is assigned, the assignee (as well as the lessee) is liable to the landlord or reversioner, for the future performance of the covenants of the lessee: and such assignee remains

(*y*) *Cousins v. Phillips*, 35 L. J., Ex. 84; and see (as regards *crown lands*) 8 & 9 Vict. c. 99, s. 7; and (as regards *church lands*) *Eccle-*

siastical Commissioners for England v. Treemer, (1893) 1 Ch. 166.
(*z*) 2 Bl. Com. 326.

liable until he assigns over in his turn to another person (*a*); and this liability attaches to him even without entry (*b*), *scil.*, where the assignment is by deed. However, the assignee is not liable by force of the assignment, except on such covenants as *run with the land* (*c*); and he is also entitled to enforce against the reversioner any covenant of that kind which the lease contains in favour of the lessee; and in case the reversioner conveys his interest to another, then to enforce it, also, against such grantee of the reversion (*d*). But if the transfer be for a single day short of the residue of the term, no liability or claim on the original covenants can arise between the transferee on the one hand, and the reversioner or the grantee of the reversion on the other hand, for it is then an under-lease and no assignment; and the alienee, not coming precisely into the place of the alienor, is in no privity with the reversioner (*e*). No deed or other writing was necessary, at common law, to the validity of an assignment (*f*); though, in the case of a lease for life, it could not be effected without livery of seisin (*g*); but by the Statute of Frauds, (29 Car. II. c. 3,) the same provision as to the necessity of a written instrument was made, with respect to an assignment, as before mentioned in the case of a surrender. And now, by 8 & 9 Vict. c. 106, s. 3, an assignment of a chattel interest (not being copyhold) in any tenements or hereditaments, made after 1st October, 1845, shall be void at law, unless made not only in writing but by deed; while on the other hand, by the effect of the same statute, sect. 2, an assignment even of a lease for life

(*a*) Taylor *v.* Shum, 1 B. & Pul. 21; Moule *v.* Garrett, Law Rep., 7 Exch. 101; Barnard *v.* Godseall, Cro. Jac. 309.

(*b*) Williams *v.* Bosanquet, 1 Brod. & Bing. 248.

(*c*) Whitton *v.* Peacock, 2 Bing. N. C. 411.

(*d*) 32 Hen. 8, c. 34; Thursby

v. Plant, 1 Saund. by Wms. 230 b; Wright *v.* Burroughes, 3 C. B. 685.

(*e*) Holford *v.* Hatch, Doug. 182; Baker *v.* Gostling, 1 Bing. N. C. 19.

(*f*) Noke *v.* Awder, Cro. Eliz. 373, 436; Moore, 419, S. C.

(*g*) Earl of Derby *v.* Taylor, 1 East, 502.

may now be effected by deed of *grant* without livery of seisin. The proper operative words in an assignment are “assign, transfer, and set over”; but it may be effected by any words which are sufficient to express the intention (*h*); wherefore words of purported assignment will be read as words of under-letting, and *vice versâ*, if and according as the intention of the parties will be effected thereby (*i*).

X. [A Defeasance is a collateral conveyance, made at the same time with another conveyance, containing certain conditions, upon the performance of which the estate then created may be *defeated*, or totally undone (*k*). And in this manner mortgages were in former times usually made; the mortgagor enfeoffing the mortgagee, and he at the same time executing a deed of defeasance, whereby the feoffment was rendered void on repayment of the money borrowed at a certain day.] And this, *when executed at the same time with the original conveyance*, was considered as part of it by the the antient law: and, on that account only, indulged (*l*). For a conveyance of the freehold, at common law, could not be defeated or recalled by a deed of defeasance executed *afterwards*; and if such conveyance (being a conveyance by the common law) contained a proviso that it should be lawful for the grantor by subsequent act to revoke the same, the proviso was void for repugnancy (*m*). But things that were merely executory, or to be completed by matter subsequent,—as rents, of which no seisin could be had till the time of payment, and so also annuities, conditions, warranties, and the like,—were always liable to be recalled by defeasances made subsequent to the time of their creation (*n*). Defeasances

(*h*) *Parminster v. Webber*, 8 Taunt. 593; *Hartshorn v. Watson*, 5 Bing. N. C. 477.

(*i*) *Poultney v. Holmes*, 1 Stra. 405; *Beardman v. Wilson*, Law Rep., 4 C. P. 57.

(*k*) Co. Litt. 236 b.

(*l*) Co. Litt. 236.

(*m*) Ibid. 237 a.

(*n*) 2 Bl. Com. p. 327; Co. Litt. 237 a; Co. Litt. by Butler, 237 a, n. (1).

of land are now of rare occurrence: the practice in modern times being (as in the case of a mortgage) to include in the same deed both the conveyance of the land to the alienee, and the conditions (if any) to which it is to be subject, and by which its effect may be defeated.

XI. We will conclude this chapter by mentioning that there was also a common law conveyance termed a *Lease and Release* (*o*). It obtained where one, desirous to convey in fee, first made a lease to the proposed alienee—for example, for one year—which demise, if perfected by actual entry, conferred on him a complete leasehold estate (*p*). The lessee then became capable of receiving a release of the reversion, for he would be tenant of the particular estate on which that reversion was expectant, and the next step therefore was to execute a release of the land to him and his heirs, so that by the conjoint operation of the two conveyances he became, without livery of seisin, tenant in fee in possession. The release in this case operated by way of *enlargement of the estate* of the lessee. This common law conveyance by lease and release was the foundation of the conveyance (mentioned in the next chapter), also called a lease and release, but which (as we shall presently see) operated under the Statute of Uses.

(*o*) Hist. Eng. Law, by Reeves, (*p*) 2 Bl. Com. 144.
vol. iii. p. 357; vol. iv. p. 356.

CHAPTER XVIII.

OF CONVEYANCES UNDER THE STATUTE OF USES.



THE subject of conveyances by the common law having now sufficiently engaged our attention, we have to examine—

Secondly, Conveyances which derive their force from the statute law ; and of these the first place is due to Conveyances founded on the Statute of Uses. It will be remembered (*a*) that this statute entirely failed of its object, which was to extinguish equitable ownerships ; but the statute led to secondary results of a most important character, affecting the matter of conveyances ; and it is with these that we are now to be concerned.

The methods employed for creating or raising uses at the period when the statute passed, were principally three : viz. feoffment, covenant to stand seised to uses, and bargain and sale (*b*). A feoffment transferred the legal estate in the manner already explained when we treated of common law conveyances ; and it was applied to the purpose now in question, by declaring in the deed of feoffment, or some other collateral instrument, to whose *use* the feoffee was to hold, and defining the estate or interest for which such use was to subsist (*c*). The covenant to stand seised, and the bargain and sale, emanated from the doctrine of equity, that the owner of land who covenanted to stand seised of

(*a*) Vide sup. pp. 344—356.

(*c*) 1 Sand. Uses, pp. 172, 173 ;

(*b*) Hist. Eng. Law, by Reeves, Sugd. Gilb. Introd. xlii.
vol. iv. pp. 161—163.

it to the use of some near relative, or who entered into a bargain and sale of it for a pecuniary consideration,—was thenceforward to be considered as holding it to the *use* of such covenantee or bargainee respectively; and once this doctrine was established, the putting of lands into use was accomplished with the greatest facility, by the mere execution, on the part of the owner, of a deed of covenant to stand seised (or of a deed of bargain and sale), for such estate as therein mentioned, to the use of the intended *cestui que use*: because a use conformable to that estate immediately arose in favour of the covenantee or bargainee (*d*); and though the original owner continued seised, (there being no transfer of the legal estate,) his ownership became nominal only, for he held subject to the use. In these two latter modes, therefore, as well as by the feoffment, it had become the common practice to raise uses before the Statute of Uses passed. And after that event, it became at once obvious that uses were capable of being turned to a new purpose, viz. the conveyance of the legal estate upon a principle unknown to the common law. For we may remember that by the effect of the statute, whenever there is a *seisin to a use*, that use is executed, or (in other words) transmuted into the equivalent legal estate. A party, therefore, who desired to aliene his land after the passing of this Act, had only to create (by whatever means) a seisin to the use of the proposed alienee, for such interest as intended (*e*); and a legal estate of the same description was then transferred to such alienee by force of the statute, as effectually as if it had been conveyed by one of the ordinary methods of the common law. It was also obvious that this new principle of conveyance enabled parties to escape from the many restrictions of the common law, with respect to the modification of estates; for uses might be limited with

(*d*) 1 Sand. Uses, p. 172; Fox's case, 8 Rep. 941, n.

(*e*) 1 Cruise, Dig. 440.

greater freedom than the land itself; and as by a covenant to stand seised, or a bargain and sale, a seisin to uses might be created without any solemnity beyond the simple execution of a deed,—those who were desirous to avoid the publicity and other inconveniences connected with livery of seisin, effected their purpose with ease, by resorting to one of these methods, and making it a medium for the operation of the new principle (*f*). Under these circumstances it naturally happened, that the same three methods which, before the statute, had been ordinarily employed to raise uses, now began to be employed as modes of transferring the legal estate for the benefit of the transferee; and in connection with this they were also made, as often as occasion required, to fulfil their former office of creating equitable interests. And to effect this nothing more was necessary than to insert in them a limitation of one use upon another, in the manner described in the chapter on Uses and Trusts; for while the first use was executed by the statute, and became the legal estate, the second use retained, under the name of *trust*, the equitable character designed. Such is the principle of conveyances under the Statute of Uses, considered as a class. They comprise not only the feoffment to uses, the covenant to stand seised, and the bargain and sale, but also that species called a lease and release, (added to their number soon after the statute passed,) and a fifth of comparatively recent introduction, and which may be denominated a grant to uses. And this last, as we shall have occasion presently to explain, nearly superseded all the rest, in the practice of conveyancing; and, modified as it has been by the Conveyancing Act, 1881 (*g*), it is in fact available in all cases of conveyance whatsoever. Yet as some acquaintance with the four former will continue to be of importance, so far as the investigation of titles to

(*f*) 2 Sand. Uses, p. 40; 2 Bl. Com. 337.

(*g*) 44 & 45 Vict. c. 41.

land, and the history of the law in general, is concerned, it will be necessary here to examine, individually and in some detail, the whole of the five that have just been enumerated. And we will begin with—

I. A Feoffment to Uses. This was simply the ordinary conveyance by the common law, with a limitation to uses superadded. Thus, if A. were desirous to convey to B. in fee, he might do so by enfeoffing a third person, C., (of course with livery of seisin,) to hold to him and his heirs to the use of B. and his heirs; the effect of which was to convey the legal estate in fee simple to B. For the legal estate passed to C. by means of the livery, in like manner as it would have done before the statute; but no sooner had this taken place, than the limitation to uses began to operate, and C. thereby became seised to the use limited; the consequence of which was, that, by force of the statute, the legal estate was *co instanti* taken out of C. and vested in B., for the like interest as was limited in the use, that is, in fee simple. B. thus became the legal tenant as effectually as if the feoffment had been made to himself, and without the intervention of a trustee. This method, however, involving as it did the necessity of making livery of seisin, was never of frequent occurrence in modern practice (*h*).

II. A Covenant to Stand Seised to Uses. This was a conveyance (*i*) adapted to the case where a person seised of land in possession, vested remainder, or reversion, proposed to convey his estate to his wife, child, or kinsman (*k*); and in its terms it consisted of a covenant by the owner to stand seised to the use of the intended transferee (*l*). Before the Statute of Uses, this would merely have raised a use in favour of such party; but since that

(*h*) 2 Sand. Uses, p. 13.

(*k*) 2 Sand. Uses, pp. 34, 94.

(*i*) *Roe v. Tranmaer*, Willes, 682;

(*l*) 2 Bl. Com. 338.

Doe v. Davies, 2 Mee. & W. 503.

Act, the legal estate was transferred to him; for, the covenantor being by the effect of his covenant seised to the use of the covenantee, the statute immediately executed that use. But the conveyance in question was held to be ineffectual, unless the parties to it stood to one another in the relation of marriage or of near consanguinity; for no use was raised in contemplation of equity, in case of a mere contract, unless such contract was founded on proper consideration, such as *natural affection*, and therefore, unless the parties were connected as above, there was no use for the statute to take effect upon (*m*). On account of inconveniences connected with this principle, and for other reasons, this species of conveyance became by degrees wholly laid aside (*n*).

III. A Bargain and Sale. This was a conveyance adapted to the case where a person seised of land in possession, vested remainder, or reversion, proposed to convey it to some other person. In its terms it consisted of a bargain and sale for money by the owner to the intended alienee; and at common law such bargain and sale might be a verbal one merely. By the effect of this contract, the bargainor became seised to the use of the bargainee, in fee, in tail, for life, or for years (according to the nature of the limitation); and this, before the statute, was the whole effect of the instrument; but afterwards the statute executed that use, and clothed the alienee with a commensurate legal estate. But as it was essential to the efficacy of a covenant to stand seised, that it should be made in consideration of natural affection, so, for the like reason, it was requisite in the case of a bargain and sale, that it should be founded on *pecuniary* consideration; for otherwise no use would be raised, and there would be

(*m*) 2 Sand. Uses, pp. 90, 94;
Hist. Eng. Law, by Reeves, vol. iv.
p. 162.

(*n*) 2 Fonb. Tr. Eq. 25; Doe *d.*
Starling *v.* Prince, 10 L. J. (C. P.)
223.

nothing for the statute to operate upon. And with respect to this conveyance, it is to be observed, that it possessed in a peculiar degree the recommendation to which we before adverted, of enabling parties to transfer a freehold without livery of seisin. For the covenant to stand seised could rarely be made available to the purpose, as it operated only between persons standing in particular relations to each other; but in the extensive class of conveyances which take place between seller and purchaser, a bargain and sale afforded the ready means of dispensing with livery of seisin and attornment; since by the insertion into the deed of a small sum of money, as the nominal consideration of a transfer, it was easy, even when the transaction was not really of the pecuniary kind, to obtain the benefit of this mode of conveyance (*o*). And not only the freehold in possession might be thus conveyed without livery, but a remainder or reversion might also be passed by the same method, and that without *attornment* (*p*). But secret transfers of land being opposed to the policy of the law, the legislature, as soon as it perceived that these might be accomplished with facility by means of a bargain and sale, hastened to provide a remedy (*q*); and accordingly it was enacted, by the statute 27 Hen. VIII. c. 16 (called the Statute of Inrolments), that no bargain and sale should enure to pass a freehold, unless the same were by *deed indented*, and *enrolled* within six months after its date, in one of the courts of Westminster Hall, or else with the *custos rotulorum* of the county, or with the proper officer of certain corporate towns (*r*).

A bargain and sale, it is to be observed, was also capable of conferring a complete estate for years, without entry; a property that belonged not to a conveyance at common law: for a common law lease for years gives no

(*o*) 2 Sand. Uses, p. 41.

(*q*) 2 Sand. Uses, pp. 43, 44, 51;

(*p*) 1 Saund. by Wms. 234 b,
n. (4); Shove v. Pincke, 5 T. R.

Bac. Use of Law; 2 Bl. Com. 338.

(*r*) 2 Sand. Uses, p. 41.

complete estate until entry has been made. It is, therefore, to be understood, that if a man bargained and sold his land for a term of years, the use thus raised was executed and became a complete estate for years, by force of the statute, without any additional ceremony; upon the same principle that a bargain and sale, in respect of a freehold interest enured to pass the freehold, without livery of seisin (*s*). And though the Statute of Inrolments provided compensation for the tendency of bargains and sales to dispense with livery in freehold conveyances, it made no similar provision to guard against their effect in conveying a term of years without entry; for these chattel interests, being then but of a precarious nature, were not thought of sufficient importance to be included in its enactment (*t*). A bargain and sale for term of years was therefore effectual without inrolment (*u*); and differed, in this respect, from a bargain and sale for an estate of freehold.

No particular form of words was essential to the legal efficacy either of a bargain and sale or of a covenant to stand seised (*x*); and although “Bargain and sell” were the words of transfer ordinarily used in the one case, and “Covenant to stand seised” in the other, yet other words would have the same effect (*y*),—the distinctive character of each of these conveyances being determined by the consideration on which it was founded (*z*). But of course, if the words employed were such as to indicate that there was no intention of transferring the property but that there was merely an engagement to convey by a future instrument, no use would arise, and consequently no estate would pass (*a*).

The rule, which required a bargain and sale to be

(*s*) *Barker v. Keate*, 2 Mod. 249;
Mallory's case, 5 Rep. 286.

(*t*) 2 Bl. Com. 338.

(*u*) *Ibid*.

(*x*) 2 Sand. Uses, pp. 56, 90; *Doe v. Davies*, 2 Mee. & W. 503.

(*y*) 2 Sand. Uses, p. 90.

(*z*) 2 Fonb. Tr. Eq. 47.

(*a*) 1 Sand. Uses, pp. 118, 120.

founded on pecuniary consideration, was held to be matter of form only, and to be sufficiently complied with if the conveyance *purported* to be founded on such a consideration; and any trivial sum might be inserted (*c*); and it was immaterial whether the sum so inserted were actually paid or not (*d*). And we will, lastly, observe regarding this conveyance, that for its legal efficacy, it was required by the Statute of Frauds (29 Car. II. c. 3) to be in writing, and is required by 8 & 9 Vict. c. 106 to be by deed.

IV. A Lease and Release. The conveyance so described was of a compound description, consisting of two separate parts; first, a bargain and sale; secondly, a common law conveyance by release: and, (like the bargain and sale,) it was adapted to the case where a person seised of land in possession, vested remainder, or reversion, proposed to convey his interest to another.

A conveyance by lease and release obtained occasionally at the common law; and by its means an estate might be conveyed by lease *and entry* to a proposed alienee, without livery of seisin, in the manner explained in our last chapter. Now when the Statute of Inrolments rendered it impossible to effect a secret conveyance of the freehold, by the method of bargain and sale, the practitioners of the day were left to devise some new means of attaining that object: and they accordingly invented for the purpose a new conveyance under the Statute of Uses analogous to the common law lease and release (*e*). Instead of a lease, the conveying party was made to execute a bargain and sale for some leasehold interest, for example, for the term of one year; and this without any inrolment, passed the legal estate for a year to the bargainee, (the Statute of Inrolments extending to freeholds only,) and the estate so transferred was complete without actual entry (*f*). The trans-

(*c*) 2 Sand. Uses, p. 54.

(*d*) Sugd. Gilb. 96.

(*e*) 2 Sand. Uses, p. 71; 2 Prest. Conv. 219.

(*f*) Sand. ubi sup.

freee therefore was capable of receiving a release of the freehold and reversion (*g*) ; which release was accordingly granted to him on the next day (*h*). This compound conveyance—which is said to have been invented by Serjeant Moore soon after the Statute of Uses (*i*)—was called, like its common law prototype, a lease and release ; though, properly speaking, it was rather a *bargain and sale and release* ; and as it was competent to pass the freehold without livery of seisin, entry, or inrolment, or any other ceremony than the execution of the deeds themselves (*k*), and was in some other technical points more advantageous than a bargain and sale, it soon grew into familiar use (*l*) ; and became so generally established as almost entirely to supersede every other method of conferring a freehold estate, whether at the common law, or under the Statute of Uses. The lease (or bargain and sale) and the release, in practice, used always to constitute separate deeds, the former bearing date the day before the latter ; but if comprised in the same deed, they were understood to be equally effectual (*m*) ; and by the 4 & 5 Vict. c. 21, a release expressed to be made under that Act had the same effect as a lease and release ; and on the release, some use was ordinarily engrafted ; and if it was one to the releesee himself in fee, he took the legal estate as at common law ; but if the use were declared to a third person, it was executed by the statute, and the legal estate passed accordingly to *him*.

V. A Grant to Uses. By reason of the provision of the 8 & 9 Vict. c. 106, s. 2, to the effect that corporeal hereditaments “shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well “as in livery,” all conveyances of hereditaments, (whether

(*g*) Sand. ubi sup. ; 2 Prest. Law, by Reeves, vol. iv. p. 355.
Conv. 219.

(*k*) 2 Sand. Uses, p. 72.

(*h*) Ibid.

(*l*) Ibid., p. 60.

(*i*) 2 Bl. Com. 338 ; Hist. Eng.

(*m*) Sugd. Gilb. 229 (n.).

corporeal or incorporeal, whether in possession or in expectancy, and whether for an estate of freehold or for an inferior estate,) may now be brought within the range of that common law conveyance discussed in the last chapter under the head of grant; though, in its antient and proper application, the conveyance by grant was confined to the transfer of incorporeal hereditaments and estates in expectancy: and this being the case, a grant in fact supplanted, generally speaking, all these methods, and became the almost universal expedient for conveying real estate *inter vivos*. It is the practice of conveyancers to import into a grant of corporeal hereditaments limitations to uses, and a conveyance so framed (when the use is not limited to the grantee) takes effect under the Statute of Uses; for while the seisin to the use is created by force of the statute 8 & 9 Vict. c. 106, the use is converted into the legal estate by force of the statute 27 Hen. VIII. c. 10; and the operation is the same of a conveyance under the Conveyancing Act, 1881, which, as we have seen, has made the use of the word “grant” unnecessary (*n*).

Having thus considered each of the different conveyances under the Statute of Uses, it is now time to make some remarks applicable to those conveyances as a *class*.

We may remark then, in the first place, that conveyances to uses must of course comprise all the circumstances necessary to bring the Statute of Uses into operation. Some use, therefore, (either *in esse* or otherwise,) must be raised by them, and some sufficient seisin to such use must be constituted; or, in the language of conveyancers, there must be a seisin proper to support or *serve* the use (*o*). And from this necessity of a seisin to a use it follows, that an existing term of years cannot be transferred by any method of conveyance depending on the Statute of Uses

(*n*) 44 & 45 Vict. c. 41, s. 49.

(*o*) 2 Sand. Uses, p. 59; 1 Sand. Uses, pp. 97, 133, 140.

for its operation ; for of a mere chattel interest there can be no seisin : though, on the other hand, the owner of the freehold may convey it by these methods, for a term of years ; for he has a seisin out of which the use for the term may be served (*p*). For the same reason it has also been supposed that a corporation aggregate could not aliene land by a conveyance under the Statute of Uses (*q*) ; for it was part of the antient doctrine with respect to uses, that such bodies as these could not be seised to any use but their own (*r*). When corporations aggregate, therefore, had occasion to make conveyances of their lands, the method adopted was commonly that of a feoffment ; or a lease with actual entry, followed by a release (*s*). But of course a corporation, equally with an individual, can now make an effective conveyance whether for a freehold or for a leasehold interest, either by grant under the 8 & 9 Viet. c. 106, or by simple conveyance under the Conveyancing Act, 1881.

The use which is required for the purpose of a conveyance under the statute may be either expressly declared or implied by law. Thus, if A. convey by feoffment or by lease and release to B. in fee, without consideration, and without declaring any use, there will be a *resulting* use, by construction of law, to A. himself ; and such use the statute will execute accordingly (*t*).

A limitation of the legal estate by way of use, that is to say, in a conveyance operating under the Statute of Uses, is governed by the same principles that apply to the creation of estates by a common law assurance (*u*). Thus the word *heirs* used to be necessary, at common law, to create an estate of inheritance (*x*) ; and in like manner if

(*p*) 2 Sand. Uses, p. 59.

(*q*) 4 Cru. Dig. 175 ; Sugd. Gilb. 7, (n.).

(*r*) Vide sup. p. 349.

(*s*) 2 Sand. Uses, p. 59 ; Sugd. Gilb. 7, n. (1).

(*t*) Co. Litt. 271 b ; 1 Sand. Uses, pp. 106, 109 ; Doe v. Rolfe, 3 Nev. & Per. 648.

(*u*) 1 Sand. Uses, pp. 123, 124 ; Corbet's case, 1 Rep. 87 b.

(*x*) 2 Bl. Com. 109 ; Nevell v. Nevell, 1 Roll. Ab. 837.

a man bargains and sells to A., without adding *and his heirs*, or the now equivalent expression *in fee simple*, A. has only an estate for life (*y*). So an estate may be limited by way of use (as well as in a common law conveyance) in possession, in remainder, or in reversion (*z*); and, if in remainder, must be limited to take effect in possession immediately on the determination of the particular estate (*a*). So the remainder may be either vested or contingent (*b*); and is subject (if contingent) to the common law rule, that if it amount to a freehold, it cannot be limited on a particular estate less than a freehold (*c*). Legal estates created by way of use are also subject, in general, to the same incidents as if created by the methods of the common law (*d*); *e.g.*, where a particular estate was limited by way of use, it was formerly liable to forfeiture if the tenant made a feoffment for a larger estate than his interest warranted; and if a contingent remainder was limited by way of use, and the particular estate was destroyed before the contingency happened, the remainder was defeated (*e*),—and the Contingent Remainders Amendment Act, 1877, applies equally to a remainder limited by way of use, as to a remainder limited at the common law.

But while a limitation by way of use, is thus in general subject to common law principles, there are some very material particulars, in which it has always been allowed a greater latitude (*f*); that is to say, the following:—

1. By the common law, a man could not in any case be a purchaser, (that is, take an estate,) under his own conveyance; for he could not, in the nature of things, unite the opposite capacities of grantor and grantee, feoffor and feoffee (*g*). Thus A., seised in fee, could not

(*y*) 1 Sand. Uses, p. 124.

(*z*) Sugd. Gilb. lvii., lviii.

(*a*) Sugd. Gilb. ib. 164.

(*b*) Sugd. Gilb. lviii. 153.

(*c*) Ib. 164, 165.

(*d*) 1 Sand. Uses, p. 166.

(*e*) Sugd. Gilb. p. 298.

(*f*) 1 Sand. Uses, p. 130.

(*g*) *Pibus v. Mitford*, 1 Vent. 378; *Southcot v. Stowell*, 2 Mod. 210; 1 Sand. Uses, 131, 132; 2 Prest. Est. 20.

convey to himself for life, remainder over to B. in fee; nor to B. for life, remainder over to himself in fee. In the first case, the whole conveyance would be void; in the second, the remainder; A. in such case taking no remainder, but continuing in the *reversion*, as of his former estate (*h*); and the distinction involved this practical difference, that the reversion, being the old estate, was in its descent confined to the blood of the same purchaser as before; whereas if A. had taken it as a remainder, it would (according to the general law of inheritance) have been descendible to his heirs general, whether his former title to it had been by purchase or by descent (*i*). But indirectly, and through the medium of a limitation to uses, it has always been practicable for a man to become a purchaser of his own estate (*k*); thus, A. may by feoffment, or lease and release, convey to a third person, C., to the use of himself, the grantor, for life, with remainder to the use of B., in tail or in fee; or to the use of B. for life, with remainder to the use of himself, the grantor, in tail; and in all these cases he will take the legal estate by purchase accordingly (*l*). Yet if the remainder were to the use of himself in *fee*, he would not at one time have taken by purchase; at least not in such a sense as to have made himself a purchasing ancestor. For such a use was considered as amounting only to the *old use in reversion*, so that it would have been converted by the statute into a legal estate in *reversion*, which would have descended to the blood of the same purchaser as before (*m*); and such was the state of the law at the time

(*h*) Co. Litt. 22 b; Read *v.* Errington, Cro. Eliz. 321; 2 Bl. Com. 176.

(*i*) 2 Bl. Com. 176; Watk. Desc. 169.

(*k*) Pibus *v.* Mitford, 1 Vent. 378; Southcot *v.* Stowell, 2 Mod. 210; Watk. Desc. 180.

(*l*) Co. Litt. ubi sup.; Co. Litt. by Harg. 13 a, n. (2); 1 Sand. Uses, p. 135; Sugd. Gilb. pp. 150, 151.

(*m*) 1 Rep. 129 b, 130 a; Co. Litt. 23 a; Read *v.* Errington, Cro. Eliz. 321; Wood *v.* Douglas, 28 Ch. Div. 327; Moore *v.* Simkin, 31 Ch. D. 95.

of the passing of the Inheritance Act (3 & 4 Will. IV. c. 106); but that Act (sect. 3) has enacted, "that when
 "any land shall have been limited by any assurance, executed after the 31st December, 1833, to the person or to
 "the heirs (*n*) of the person who shall thereby have conveyed the same land, such person shall be considered to
 "have acquired the same as a *purchaser* by virtue of such
 "assurance, and shall not be considered as entitled thereto
 "as of his former estate, or part thereof." And just as a man could not, at the common law, convey to himself, so he could not convey to his wife, for she was considered as the same person with him (*o*); but the object was effected through the medium of a limitation to uses; that is, by creating a seisin in another person, and declaring a use to the wife (*p*). But now, under the Conveyancing Act, 1881, a man may convey freeholds directly to his wife, either alone or jointly with another or others (*q*); and may also convey freeholds directly to himself and another; and the Act last mentioned also enables choses in action to be conveyed in the same way,—this provision being apparently in completion of the provision contained in s. 21 of Lord St. Leonards' Act (22 & 23 Vict. c. 35), by which it was provided that leaseholds and other personal estate might (*e.g.*, on the appointment of a new trustee) be assigned by the assignor direct to himself and another or others.

2. At common law, a freehold could not be created to commence *in futuro*; or, in other words, could not be limited to take effect at a future period, except by way of remainder upon some particular estate also passing at the same time out of the grantor. But this might be effectually done by a conveyance under the Statute of

(*n*) A limitation by a man to his own heirs, is equivalent to a limitation to himself and his heirs; "for," says Lord Coke, "*hæres est pars antecessoris*." (Co. Litt. 22 b; 1 Vent. 378; 2 Bl. Com. 176;

1 Rep. 129 b, 130 a.)

(*o*) Co. Litt. 112 a; Lucas v. Lucas, 1 Atk. 271.

(*p*) 1 Sand. Uses, p. 132.

(*q*) 44 & 45 Vict. c. 41, s. 50.

Uses: for a use was never subject to the like restriction, but might be limited for any extent of interest to commence *in futuro*; and the statute, taking effect on such future interest, transmuted it into the legal estate (*r*). Thus a man might covenant to stand seised in fee to the use of another (or bargain and sell to him in fee) seven years hence, and such conveyance would be effectual (*s*). So by feoffment, or lease and release, an estate might have been conveyed to A. and his heirs to the use of B. and his heirs, at the death of C. (*t*). A use thus limited *in futuro*, independently of any preceding estate, is called a *springing* use (*u*); and such use is also often described as an *executory* use, because it is not executed by the statute until it comes into *esse* by the arrival of the period contemplated. Thus, in the two first examples, the whole fee would remain in the covenantor or bargainor, till the seven years expired (*x*); in the two latter, a use resulted to the feoffor or releasor, till the death of C. (*y*); but on these events happening, the springing use would be executed, and the *cestui que use* would become clothed with the legal estate in fee.

3. By a common law conveyance, an estate could not be limited, upon a future event, to one person, in abridgment or defeasance of an estate of freehold, first limited to another (*z*); which is often expressed, where the dispositions are both in fee simple, by the maxim that *a fee cannot be limited on a fee* (*a*). Thus, land could not be conveyed to B. in fee, or for life, with a provision that when C. returned from Rome, it should thenceforth immediately go over to C. in fee (*b*); for this would have been to defeat the first estate by force of a condition, which could

(*r*) Sugd. Gilb. 161, (n.).

(*s*) 1 Sand. Uses, p. 139.

(*t*) Ib. 140.

(*u*) Sugd. Gilb. 153.

(*x*) Ib. 161, (n.), 153, (n.).

(*y*) 1 Sand. Uses, p. 140.

(*z*) Co. Litt. by Butl. 203 (b), n. (1); Cogan v. Cogan, Cro. Eliz. 360.

(*a*) Fearne, by Butl. p. 372; 1 Sand. Uses, p. 143; 2 Bl. Com. 173.

(*b*) Fearne, by Butl. pp. 14, 15.

only be done by the entry of the grantor, or his heirs; and the effect of such entry would have been to destroy the second limitation as well as the first, and to have restored the grantor and his heirs to their former estate (*c*). But a use might always be made to shift, in this manner, from one person to another (*d*); and therefore, since the statute, land may be conveyed through the medium of a use, in like manner; as by limiting it to A. and his heirs, to the use of B. and his heirs, with a proviso, that when C. returns from Rome, the land shall be to the use of C. and his heirs (*e*). A use so limited in derogation of a preceding estate, is called a *shifting* or *secondary* use (*f*); and this also is of the *executory* kind, the operation of the statute being suspended till the event arrives (*g*). And here we must observe, that there can be no fee simple limited after a fee simple, even under the Statute of Uses, —unless, of course, the second fee simple be either in defeasance of the first fee simple, or be in the nature of an alternative limitation. It was firmly settled, also, that no estate capable of being considered as a remainder (according to the rules by which remainders are limited) should ever be construed as a shifting or springing use (*h*), a maxim which has now been slightly broken in upon by the enactment, that every contingent remainder created by any instrument executed after 2nd August, 1877, or by any will or codicil revived or republished by any will or codicil after that date, which would have been valid as a springing or shifting use or executory devise or other limitation had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the prior particular estate of freehold determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been

(*c*) Co. Litt. 379 a; Litt. ss. 721, 722, 723.

(*d*) Sugd. Gilb. 153, 154, (n.); 1 Sand. Uses, p. 152.

(*e*) 1 Sand. Uses, p. 149.

(*f*) Sugd. Gilb. 152, (n.).

(*g*) Sugd. Gilb. 154, 155, (n.); 1

Sand. Uses, p. 144.

(*h*) 2 Saund. by Wms. 388; Fearne, by Butl. 393, 9th edit.

created as a springing or shifting use or executory devise or other executory limitation (*i*).

4. The grantor, in a common law conveyance, could not reserve to himself, nor confer on any other person, the power of revoking or altering the grant, by any future act or instrument: for that was deemed repugnant to the conveyance itself (*k*). The utmost that the common law allowed, was a deed of defeasance (coeval with the grant, and therefore esteemed a part of it) upon events specifically mentioned (*l*). But the limitation of a *use*, subject to a power of this description, was not considered as involving any repugnancy; for a use was a mere direction to the trustee how he was to deal with the legal estate; which might well be recalled or changed (*m*). Therefore, in a conveyance under the Statute of Uses, a proviso giving to the grantor, the grantee, or a stranger, authority to revoke or alter, by a subsequent act, the estate first granted, would be valid; for it is in effect no more than an authority to revoke the use first limited, or to declare a new one (*n*). Such provisos are called *powers*,—a term properly applicable to *all* authorities, as distinguished from *estates*: and such powers are either mere *powers of revocation*, enabling the grantor simply to recall what he has bestowed; or they are *powers of revocation and of new appointment* (*o*), or of *appointment* simply (which imply in themselves a power of *revocation*),—authorizing the grantor, or some other person, not only to recall the estate first granted, but also to make a new disposition of the estate. The first will of course hardly find a place except in grants of a gratuitous nature, (or *voluntary* conveyances as they are called,) though in these they are naturally to be expected (*p*); mankind, according to the remark of Lord Bacon, having always

(*i*) 40 & 41 Vic. c. 33.

(*n*) Ibid.

(*k*) Co. Litt. 237 a; 2 Bl. Com. 327, 335; 2 Fonb. 158, 159.

(*o*) 1 Sand. Uses, p. 155; 4 Cruise, Dig. 228.

(*l*) 2 Bl. Com. 335.

(*p*) 2 Fonb. 155, n.

(*m*) Sugd. Gilb. 158, (n.).

affected to have the disposition of their property revocable in their own time, and irrevocable ever afterwards (*q*). But with respect to powers of revocation and of new appointment, they are of frequent occurrence in family settlements; their object not being to indulge the caprice of any party, but to carry into effect with greater convenience the arrangements actually contemplated. Thus, if a life estate be limited to the settlor, with remainder over, it is common to insert a power enabling him from time to time to make effectual leases of the property in possession, for terms not exceeding twenty-one years; a privilege reasonable and convenient in itself, but which (apart from statute) was not incident to the estate of a tenant for life generally. Of the same nature, in general, are the usual powers of jointuring, selling, charging land with the payment of sums of money, and the like (*r*); and all these are technically described as powers of revocation and of new appointment,—because, in authorizing a new disposition not made by the conveyance itself, they operate *pro tanto* as a revocation of those which it contains (*s*). Such a power, if closely considered, will be found to amount to an authority to create a use, to take effect in derogation, to a certain extent, of the uses first limited; or rather to the virtual limitation of an *executory* use of that description, in favour of such person, and for such estate, as shall be defined by the subsequent act of the donee of the power (*t*). The subsequent exercise of the power is called an *appointment*; and its effect (when it correctly pursues the authority) is to raise, in favour of the appointee, a use corresponding to the estate appointed; which being served out of the original seisin, is immediately executed by the statute, and transmuted into the equivalent legal estate (*u*); and when the power is exercised by deed,

(*q*) Bl. Com. ubi sup.

(*r*) 2 Sand. Uses, p. 81.

(*s*) 1 Sand. Uses, p. 155; 4 Cruise, Dig. 228.

(*t*) Sugd. Gilb. 152, 153, (n.); 2 Sand. Uses, p. 81.

(*u*) 2 Sand. Uses, p. 82; 4 Cruise, Dig. 228.

the attestation of two witnesses is now in all cases sufficient (*x*). An appointment is not considered as an independent conveyance (*y*); but is merely ancillary to the former deed; which (as already observed) contains, in effect, a prospective limitation of the new use. The appointee, therefore, is considered for most purposes as deriving his title under the original conveyance; and to be in the same position as if that instrument had actually contained a limitation in his favour, to the extent of the estate appointed (*z*). And with regard to such powers generally, the Conveyancing Act, 1881 (*a*), sect. 52, enables the donee of the power, whether coupled with an interest or not, to release the power by deed, or by deed to contract not to exercise the power; and the Conveyancing Act, 1882 (*b*), sect. 6, enables him to disclaim the power.

Not only as to the limitation of estates, but in other particulars, there are differences between conveyances to uses, and conveyances at common law. The possession was indeed given by the conveyance to uses quite as effectually as if the alienee had received livery of seisin, or had made actual entry (*c*); but as the conveyance to uses, *e. g.*, a bargain and sale, conveyed the possession by construction of law only, so it differed from a feoffment, in such incidents as resulted from delivery of possession in point of fact. Therefore, though a feoffment, when made by the tenant in actual possession, was capable of passing a wrongful estate of freehold, and, when made by a particular tenant for a greater estate than he could lawfully convey, occasioned a forfeiture (or, in the case of a tenant in tail, a discontinuance) of the particular estate, and the contingent remainders dependent on that estate used to be defeated,—no such results followed from any conveyance by

(*x*) 22 & 23 Vict. c. 35, s. 12.

(*y*) 2 Sand. Uses, p. 84.

(*z*) 4 Cruise, Dig. 282, 497;

Bringloe v. Goodson, 4 Bing. N. C.

734; Sugd. on Powers, p. 470.

(*a*) 44 & 45 Vict. c. 41.

(*b*) 45 & 46 Vict. c. 39.

(*c*) 2 Sand. Uses, p. 52.

way of use (*d*). For by the feoffment, there was an actual investiture of the possession, as for an estate of freehold; which, it was held, must take effect either *de jure* or *de facto*; but conveyances by way of use could, in their nature, pass no more than the grantor might lawfully transfer (*e*), and they received accordingly the appellation of *lawful* or *innocent* conveyances (*f*); but since the statute 8 & 9 Vict. c. 106, s. 4, this distinction has lost all its importance.

The Statute of Uses, while it thus enabled owners to dispose of their lands in methods more suitable to the exigencies of social life, and also materially enlarged the power of alienation itself, opened the door at the same time to inconveniences of a different description, and which the policy of the law thought fit to regulate by the rule (called the Rule of Perpetuities) against the creation of too remote limitations; and this rule we shall now proceed to explain (*g*). We have already had occasion to refer to the doctrine established by *Taltarum's case*, in the reign of Edward the fourth, by which (and in order to aid the free alienation of estates and to keep them in the market) a common recovery was allowed to have the effect of unfettering an estate tail; and it was doubtless in the same spirit, when limitations by way of springing and shifting uses, and under powers of revocation and of new appointment, came into practice, that the courts, contemplating with alarm the tendency of these devices to a *perpetuity*, thought it necessary to fix some period as the latest at which an estate limited by way of executory use should be allowed to vest; and such a period was accordingly established by a series of judicial decisions, and upon the analogy of the estate tail. We have seen that even

(*d*) 2 Sand. Uses, p. 73.

(*e*) *Fearne by Butler*, p. 322; *Smith v. Clyfford*, 1 T. R. 744.

(*f*) *Ibid.*

(*g*) *Co. Litt. by Butler*, 379 b, citing 327 a; *Hist. Eng. Law*, by

Reeves, vol. iii. p. 324; *Cadell v. Palmer*, 10 Bing. 140; *Tollemache v. Lord Coventry*, 8 Bligh, N. S. 547; *Monypenny v. Dering*, 16 Mee. & W. 418.

under a strict settlement, an estate tail could not, after the doctrine established by *Taltarum's* case, be preserved from alienation longer than during the life of the taker of the first estate of freehold, and the nonage of the tenant in tail next in remainder; for on attaining the age of twenty-one, the latter was competent, with the concurrence of the former, to suffer a recovery; and accordingly, and by analogy to this (*h*), it became the rule that the latest period at which an estate limited by way of executory use could be allowed to vest was (with one particular exception) the expiration of some life or lives in being, and twenty-one years afterwards (*i*); and that is now the limit of time applicable in such cases. Therefore, if a man be seised in fee of lands, and gives them to the first son of J. S. that shall attain the age of twenty-one, and his heirs,—here the estate vests, at the latest, on the expiration of J. S.'s life and the infancy of such son; and this infancy, generally speaking, cannot expire later than twenty-one years after J. S.'s death; but if the son is born *posthumously* (which brings the case within the exception above alluded to) it will expire later by the addition of the time of gestation *in utero* which follows upon such death. Also, when the period at which the estate is limited to vest comprises no life or lives in being, it is not allowed to exceed twenty-one years from the time when the limitation is created (*k*). And the law (it is said) so much abhors a perpetuity (*l*), that any limitation, either for a legal or for an equitable interest, by way of executory use, or otherwise, of such a nature as to lead to the possibility, if it were allowed, of exceeding the limit of time prescribed by the Rule of Perpetuities for the vesting of estates in lands is absolutely void (*m*); and the rule applies also to terms of years and to

(*h*) Co. Litt. by Harg. 20 a; note (5).

(*k*) *Palmer v. Holford*, 4 Russ. 403.

(*i*) 2 Bl. Com. 174; *Cadell v. Palmer*, 10 Bing. 140; S. C. 7 Bligh, N. S. 202.

(*l*) 10 Rep. 113 b.

(*m*) *Cadell v. Palmer*, *ubi sup.*; *Gilbertson v. Richards*, 5 H. & N. 453.

personal property (*u*). And in furtherance of the rule, it has been enacted by the Conveyancing Act, 1882 (45 & 46 Viet. c. 39), s. 10, with regard to instruments coming into operation on or after the 1st January, 1883, that an executory interest, in *lands*, to take effect in default of issue, or on failure of the issue, of the tenant of the executed estate, shall become void as soon as any of such issue attains the age of twenty-one years.

In connection with the rule against perpetuities, the law with respect to the accumulation of the income of property, whether real or personal, may also properly be considered. A remarkable instance having occurred, in which, to secure an immense fortune to his distant descendants, a testator had recourse to the expedient of directing the income of his property to be accumulated during the lives of all his children, grandchildren, and great-grandchildren, who were living at the time of his death, for the benefit of some future descendants to be living at the death of the survivor (thus keeping well within the rule of perpetuities),—it was thought expedient to put a check, for the future, on dispositions of this description (*o*); consequently, the Act 39 & 40 Geo. III. c. 98, commonly called the Thellusson Act, has enacted, that no such accumulation shall be allowed for a longer term than the life of the grantor, or twenty-one years from the death of the grantor or testator, or during the minority of any person living or *in ventre sa mère* at the death of such grantor or testator, or during the minority only of any person who, under the uses or trusts of the instrument directing such accumulation, would for the time being, if of full age, be entitled to the income so directed to be accumulated: and, further, that where any accumulation is directed contrary to the Act, such direction (if it specify a time that would be in excess of

(*u*) *Atkinson v. Hutchinson*, 3 P. Wms. 262.

(*o*) This was the case of Mr. Thellusson's will, as to which see *Fearne*, by Butler, p. 436, (n.).

the limit prescribed by the rule of perpetuities) shall be totally void ; and (if it express a time that would not be in excess of that limit) shall be void for the period which is in excess of the limit prescribed by the Thellusson Act ; and in the latter case, the income during the time the property is directed to accumulate contrary to the Act, shall go to such person as would have been entitled thereto, if no such accumulation had been directed (*p*) ; but the Act does not extend to any provision for payment of debts, or for raising portions for children, or to any direction touching the produce of wood or timber (*q*). Also, by the Accumulations Act, 1892 (*r*), which came into force on the 28th June, 1892, no person may now settle any property in such manner as that the rents or income thereof (or any part of such rents or income) shall be accumulated, for the purchase of *land* only, for any longer period than during the minority of the person entitled, or to be entitled, to the land to be purchased.

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| <p>(<i>p</i>) <i>Curtis v. Lukin</i>, 5 Beav. 147 ;
 <i>Jagger v. Jagger</i>, 25 Ch. Div. 729.</p> | <p>M. & G. 40 ; <i>Matthews v. Keble</i>,
 Law Rep., 3 Ch. App. 691.</p> |
| <p>(<i>q</i>) <i>Halford v. Stains</i>, 16 Sim.
 488 ; <i>Edwards v. Tuck</i>, 3 De Gex,</p> | <p>(<i>r</i>) 55 & 56 Vict. c. 58.</p> |

CHAPTER XIX.

OF CONVEYANCES BY TENANTS IN TAIL, AND BY MARRIED
WOMEN.

THE ordinary conveyances, as well those at common law as also those under the Statute of Uses, are capable of being applied to transfer the interests of tenants in tail and of married women, but are not effectual for these purposes, except by virtue of particular Acts of Parliament, the solemnities appointed by which must be strictly observed; and accordingly the conveyances by tenants in tail and by married women may properly be considered by themselves as a separate class of conveyances. For though a tenant in tail has an estate of inheritance, yet by none of the conveyances hitherto examined, unaccompanied by the solemnities referred to, can any indefeasible interest be granted by him (apart from statute) beyond the period of his own life: also, a married woman is not capable, by any of these conveyances in their simple form (*a*), to make any alienation of her lands and tenements (not being her *separate estate*) for any estate whatever; although, of course, she may, by an ordinary deed, convey her *separate estate*, and also appoint any property over which she has a power of appointment (*b*).

The incapacities of a tenant in tail in these respects arise from the Statute *De Donis* (*c*); but the incapacities of a

(*a*) 2 Bl. Com. 292.

(*c*) 13 Ed. 1, c. 1.

(*b*) Co. Litt. by Harg. 112, n. (6).

married woman are imposed upon her by the common law; in both cases, however, the law has long allowed the power of alienation through the medium of particular methods of assurance; in former times by *fin*es and *re*-coveries, which were altogether of a special nature; and now by *disentailing deeds* and *deeds acknowledged*; and which two varieties of conveyance we have now accordingly to consider.

This branch of the law is regulated chiefly by the stat. 3 & 4 Will. IV. c. 74, being the Act for abolishing Fines and Recoveries and for substituting more simple modes of assurance. By this Act, a tenant in tail is empowered to *bar* the estate tail, that is, to convey the land entailed as a fee simple absolute (or for any less estate), indefeasible by his issue, or (according to the effect of the conveyance) by the remainderman or reversioner or other persons entitled *in futuro*; and a married woman also may, with her husband's concurrence, dispose of any estate which she alone, or he in her right, may have, as fully and effectually as if she were a feme sole (*d*),—the modes of proceeding to be adopted for these purposes being by way of substitution for the antient methods of fine and recovery (*e*), which being now abolished, and of a character besides peculiarly abstruse and uninviting, we would gladly pass by without further notice. The learning, however, which they involve, is still so material to the history of existing titles, and even to the correct apprehension of the present system, that they cannot with propriety be left unexamined; and before we attempt to give any further account of the new and simpler methods which have been substituted for them, the nature of a fine, and also of a recovery, shall first be explained.

Now fines and recoveries were, both of them, conveyances by matter of record; and both consisted of fictitious suits in the Court of Common Pleas at Westminster, in

(*d*) 3 & 4 Will. 4, c. 74, s. 77.

(*e*) Sect. 2,

which the intended alienee was supposed to recover the estate by process of law. In their origin they were, in fact, actual suits commenced at law for the recovery of the possession of the land; but being found competent to confer a title, in cases where the ordinary conveyances would not suffice, they were eventually adopted, as mere means of conveyance, between persons not really standing in the relation of adverse litigants (*f*). It will be necessary, however, to consider them in detail.

And, first, of *Fines*.

[Fines were so called, because they put an end, not only to the suit then commenced, but also to all other suits and controversies concerning the same matter (*g*). They were assurances of equal antiquity with the first rudiments of the law itself; are spoken of by Glanvil and Bracton, in the reigns of Henry the second and Henry the third, as things then well known and long established (*h*); and instances are produced of them even prior to the Norman invasion (*i*). So that the statute 18 Edw. I., called *Modus levandi Fines*, did not give them original, but only declared and regulated the manner in which they should be levied.]

Now the mode of levying a fine was as follows: (1.) The party to whom the land was to be conveyed commenced an *action* at law against the intended vendor, by suing out a writ denominated, from its initial words, a writ of *præcipe quod teneat conventionem*; the foundation of which was a supposed agreement or covenant that the defendant should convey the lands to the plaintiff, and for the breach of which agreement the action was brought. On this writ there was due to the crown, by antient prerogative, a *primer fine*, or a noble for every five marks of land sued for; that is, one tenth of the annual value (*k*). The suit being thus commenced, then followed, (2.) The *licentia concordandi*, or leave

(*f*) 2 Bl. Com. 349, 357.

c. 28, s. 7.

(*g*) 2 Roll. Abr. 13.

(*i*) Plowd. 369.

(*h*) Glan. 1. 8, c. 1; Br. 1. 5, t. 5,

(*k*) 2 Inst. 511.

to agree the suit. For as soon as the action was brought, the defendant, feigning himself to be in the wrong, purported to make overtures of peace to the plaintiff, by whom they were accepted; but having, upon suing out the writ, given pledges to prosecute his suit, which he endangered if he now deserted it without licence, he therefore applied to the court for leave to make the matter up. This leave was readily granted, but on payment to the king of another fine, sometimes called the *king's silver*, and sometimes called the *post fine*, to distinguish it from the *primer fine* before mentioned. And it was as much as the primer fine and half as much more, or 10s. for every five marks of land; that is, three-twentieths of the supposed annual value (*l*). (3.) Next came the *concord*, or agreement itself, after leave obtained from the court; and this was usually an acknowledgment from the deforciant that the land in question was the plaintiff's. And from this recognition or acknowledgment of the plaintiff's right, the party levying the fine was called the *cognizor*, and he to whom it was levied was called the *cognizee*. The acknowledgment was to be made in the Court of Common Pleas—either openly in the court, or else before one of its judges, or (in the country) before two or more commissioners empowered by a special authority, called a writ of *dedimus potestatem*; and these judges and commissioners were required by statute 18 Edw. I. to take care that the cognizors were of full age, sound memory, and out of prison. And if there were any feme covert among the cognizors, she was privately examined, whether she did it willingly and freely, or by compulsion of her husband. By these acts, all the essential parts of a fine were completed; and if the cognizor died the next moment after the fine was acknowledged, provided it were subsequent to the day on which the writ was made returnable, still the fine was to be carried on in all its remaining parts (*m*). Of these the next was—

(*l*) 5 Rep. 39; 2 Inst. 511; stat.
32 Geo. 2, c. 14.

(*m*) Price *v.* Davies, Comb. 71.

(4.) The *note* of the fine, which was only an abstract of the writ and of the concord; naming the parties, the parcels, and the agreement: and, by direction of the statute 5 Hen. IV. c. 14, this was to be enrolled of record in the proper office. (5.) The fifth and last part was the *foot* of the fine, or conclusion of it: which included the whole matter; and recited the parties, and the day, year, and place when, where, and before whom it was acknowledged or levied. Of this conclusion, there were indentures made and engrossed at the chirographer's office, and delivered to the cognizor and the cognizee; usually beginning thus: "*Hæc est finalis concordia*, this is the final agreement," and then reciting the whole proceedings at length. And thus the fine was completely levied at common law.

But in order to render the fine more universally public, and less liable to be levied by fraud or covin, it was directed by 4 Hen. VII. c. 24 (in confirmation of a previous statute), that a fine, after engrossing, should be openly and solemnly read and *proclaimed* in court sixteen times; viz., four times in the term in which it was made, and four times in each of the three succeeding terms; and these proclamations (which were afterwards reduced to one in each of the four terms) were indorsed on the back of the record (*n*).

Fines thus levied were of four kinds:—1. The fine *sur cognizance de droit come ceo que il ad de son don*; that is, a fine upon acknowledgment of the right of the cognizee, as that which he hath of the gift of the cognizor. This was the best and surest kind of fine; for thereby the deforciant acknowledged in court a former feoffment to have been made by him to the plaintiff. This fine was therefore said to be a feoffment of record; the livery, thus acknowledged in court, being equivalent to an actual delivery: so that this assurance was rather a confession on record of a former conveyance, than a conveyance itself; for the de-

(*n*) By 11 & 12 Vict. c. 70, all fines theretofore levied in the Court of Common Pleas are *deemed* to have been levied with proclamations.

forciant or cognizor acknowledged the right to be in the plaintiff, or cognizee, as that which he had *de son don*, of the proper gift (*i.e.*, feoffment) of himself, the cognizor. 2. The fine *sur cognizance de droit tantum*, or upon acknowledgment of the right merely, and without mention of a preceding gift from the cognizor. This was commonly used to pass a *reversionary* interest which was in the cognizor; for of such reversion there could be no feoffment (*i.e.*, no *don*) supposed, as the possession during the particular estate belonged to a third person (*o*); and it was worded in this manner, “that the cognizor acknowledges “the right to be in the cognizee, and grants for himself “and his heirs, that the reversion, after the particular “estate determines, shall go to the cognizee” (*p*). 3. A fine *sur concessit*, which was where the cognizor, in order to make an end of disputes, though he acknowledged no precedent right, yet granted to the cognizee an estate *de novo*, usually for life or years, by way of supposed compromise; and this might be done, reserving a rent or the like, for it operated as a new grant (*q*). 4. The fine *sur don grant et render*, which was a double fine, comprehending the fine *sur cognizance de droit come ceo*, &c., and the fine *sur concessit*, and might be used to create particular limitations of estates; whereas the fine *sur cognizance de droit come ceo*, &c., conveyed nothing but an absolute estate, either of inheritance, or at least of freehold (*r*). In this last species of fine, the cognizee, after the right was acknowledged to be in him, granted back again, or rendered to the cognizor, or perhaps to a stranger, some other estate in the premises. But the first species of fine, that *sur cognizance de droit come ceo*, &c., was the one most used.

The effects of a fine were principally as follows (*s*):—

1. Like all other conveyances, a fine bound the *parties*

(*o*) Danver's case, Moore, 629.

(*p*) West. Symb. p. 2, s. 95.

(*q*) Burt. Compend. 24.

(*r*) Hunt v. Bourne, Salk. 340,

(*s*) First Real Property Report, p. 21; and see Co. Litt. by Harg.

121 a, n. (1).

thereto, and also all "*privies*," that is, persons deriving title under the parties; and this, whether levied with proclamations or not (*t*); and even if one of the parties thereto was a married woman, she would still be bound by the fine; and (supposing her husband to concur in it) it would effectually pass any estate, or bar any right of dower, that she might have in the lands therein comprised (*u*),—which peculiarity was justified by the circumstance that the court would not allow a fine, affecting a married woman's interest, to pass without privately examining her as to her voluntary consent.

2. A fine with *proclamations* bound not only parties and privies, but even *strangers*, if they failed to put in their claims within the time allowed by law, and were during all that period subject to no legal disability sufficient to excuse their acquiescence (*x*). It was in reference to this property of a fine that rights are said in our books to be barred *by fine* and *non-claim* (*y*). This doctrine, indeed, was once abolished by the statute 34 Edw. III. c. 16, which admitted persons to claim and falsify the fine at any indefinite distance of time (*z*). But by 1 Richard III. c. 7, and 4 Hen. VII. c. 24, the bar was again restored, though the time of claim was extended (*a*); and after the latter statute, and until the modern abolition of these assurances altogether, the state of the law was as follows,—that by a fine, when duly *proclaimed*, the right of all strangers whatever was bound, unless they made claim by way of action, or lawful entry (not within one year and a day, as at the common law, but) within five years after proclamations made (*b*); but *femes covert*, infants, prisoners, persons beyond the seas, and such as were not of sane

(*t*) 2 Bl. Com. 355; Hunt *v.* Bourne, Salk. 340; Doe *d.* Thomas *v.* Jones, 1 Tyrw. 517.

(*u*) 5 Cruise, Dig. 82, 154, 156.

(*x*) 2 Bl. Com. 354.

(*y*) Ibid.

(*z*) 2 Bl. Com. 354; Litt. s. 441.

(*a*) Co. Litt. by Harg. 121 a, n. (1).

(*b*) 4 Hen. 7, c. 24; Davies *v.* Lowndes, 5 Bing. N. C. 172.

mind, had a further space of five years allowed to them and their heirs after the death of their husbands, or their attaining full age, recovering their liberty, returning to England, or being restored to their right mind (*c*). By the statute 4 Anne, c. 16, it was also provided, in cases where the claim was made *by entry*, that it should be of no avail unless an action was brought within one year afterwards, to try the right of the claimant, and unless the same were prosecuted with effect. It is to be observed, however, that, in order to bar by non-claim persons who were not parties or privies, it was necessary that the person levying the fine should be seised of the freehold, either by right or by wrong (*d*): for if he had nothing in the land, or if his possession were merely as tenant for a term of years or other chattel interest, the fine might be avoided by pleading *partes finis nihil habuerunt* (*e*). And it is further to be remarked, that persons having no estate in possession, but only in remainder or reversion, were not bound to make claim within five years after proclamations made, but within five years after their right of entry accrued (*f*).

3. A fine levied by tenant in tail, with proclamations, barred the issue in tail. It had indeed been expressly provided by the Statute *De Donis*, that a fine should have no such effect (*g*); but by 32 Hen. VIII. c. 36, it was declared, that a fine, when levied with proclamations according to 4 Hen. VII. c. 24, by any person of full age, should be a sufficient bar and discharge for ever against the tenant and his heirs, claiming only by force of the entail (*h*). It did not, however, bar those in remainder or reversion upon the entail: who had either a right of entry, or a right of action, according to the distinction to be presently stated.

(*c*) 2 Bl. Com. 356.

(*d*) *Davies v. Lowndes*, ubi sup.

(*e*) Stat. 4 Hen. 7, c. 24; 2 Bl. Com. 356; *Doe d. Thomas v. Jones*, 1 Tyrw. 506.

(*f*) Co. Litt. 372 a.

(*g*) 2 Bl. Com. 355; *Doe v. Jones*, 1 Tyrw. 517; *Burton*, 239.

(*h*) Co. Litt. by Harg. 121 a, n. (1).

4. If tenant in tail of a corporeal hereditament in possession levied a fine “*sur cognizance de droit come ceo, &c.*,” with or without proclamations, it was a discontinuance of the entail (*i*) ; the effect of which was, that the issue in tail, and those in remainder, or reversion, lost that right of entry, which, upon the death of the tenant in tail, would otherwise have accrued to them respectively ; but those in remainder or reversion had nevertheless a remedy in a particular form of action called a *formedon* ; and so had the issue in tail, unless the fine was levied with proclamations. But a fine levied by tenant in tail of an incorporeal hereditament, or of an hereditament corporeal in remainder upon an estate of freehold, or in fact of any hereditament which lay in grant at common law, was no discontinuance (*k*) ; for such a fine levied in fee only created a base fee ; and the estate of those in remainder or reversion (as well as the right of entry or action of the issue in tail, where it was levied without proclamations) remained without disturbance (*l*) ; and by the statute 3 & 4 Will. IV. c. 27, no discontinuance can now avail to take away a right of entry.

5. A fine “*sur cognizance de droit come ceo, &c.*” levied by a tenant for life in possession, worked a forfeiture, if for a greater estate than the law entitled him to make ; and consequently destroyed the contingent remainders (if any) expectant on his life interest (*m*). The same result, as regards forfeiture, also followed, where such fine was levied by a tenant for a term of years (*n*).

Secondly, of *Recoveries*.

A recovery—or a *common* recovery as it was also called,—

(*i*) Co. Litt. 327 b ; 2 Inst. 335, 336 ; *Odiarne v. Whitehead*, Burr. 714 ; *Doe d. Thomas v. Jones*, 1 Tyrw. 506.

(*k*) Co. Litt. 332 a ; 5 Cruise, Dig. 236.

(*l*) Co. Litt. by Butler, 331, n. (1).

(*m*) 2 Bl. Com. 274 ; 2 Cruise, Dig. 361 ; 5 Cruise, Dig. 203, 236.

(*n*) Burt. Compend. 318.

differed from a fine, in that it supposed the suit not immediately compromised, but carried on through all its stages (o). Its nature and progress were as follows:—

[Let us, in the first place, suppose Daniel Edwards to have been tenant of the freehold, for example, tenant in tail in possession; and desirous to suffer a common recovery, in order to bar all entails, remainders and reversions, and to convey the same in fee simple to Francis Golding. To effect this, Golding was to bring an action against Edwards for the land; and he accordingly sued out a writ called a *præcipe quod reddat*. In this writ, the demandant Golding alleged that the defendant Edwards had no legal title to the land, but that he came into possession of it after one Hugh Hunt had turned the demandant out of it. The subsequent proceedings were made up into a record or recovery roll, in which the writ and complaint of the demandant were first recited; whereupon the tenant appeared, and called upon one Jacob Morland, who was supposed, at the original purchase, to have warranted the title to Edwards; and Edwards prayed that Jacob Morland might be called in to defend the title which he had so warranted. This was called the *voucher* (*vocatio*, or calling) of Jacob Morland *to warranty*, and Morland was called *the vouchee*. Upon this, Jacob Morland, the vouchee, appeared, was impleaded, and defended the title. Whereupon Golding, the demandant, desired leave of the court to *imparl*, or confer with the vouchee in private, which was usually allowed him as a matter of course. And soon afterwards the demandant Golding returned to court, but Morland the vouchee disappeared or made default. Whereupon judgment was given for the demandant Golding (thenceforth called the *recoveror*) to recover the land in question against the tenant Edwards, who was then the *recoveree*; and Edwards had judgment to recover of Jacob

[Morland land of equal value, in recompense for the land so warranted by him, and lost by his default; which was agreeable to the doctrine of warranty we have before mentioned (*p*). This was called the recompense, or *recovery in value*. But Jacob Morland having no land of his own, being usually the crier of the court (who from being thus frequently vouched was called the *common vouchee*), it was plain that Edwards had only a nominal recompense for the land so recovered against him by Golding; which land was then absolutely vested in the recoveror, by judgment of law, and seisin thereof was delivered to him by the sheriff of the county. So that this collusive recovery operated merely in the nature of a conveyance in fee simple from Edwards the tenant in tail, to Golding, the purchaser.

The recovery above described was with a single voucher only; but sometimes a recovery was with *double, treble*, or further voucher, as the exigency of the case might require. And, indeed, in modern times, it was usual always to have a recovery with *double* voucher at the least, by first conveying, where the person whose estate tail was intended to be barred was *immediate* tenant in tail, an estate of freehold to any indifferent person against whom the *præcipe* was brought (which was called making a tenant to the *præcipe*); and then the tenant to the *præcipe* vouched the tenant in tail, who vouched over the common vouchee. For if a recovery was had immediately against a tenant in tail, it barred only the estate in the premises of which he was then actually seised; whereas, if the recovery were had against another person, and the tenant in tail were vouchee, it barred every latent right and interest which he might have in the land recovered (*q*). But where there was already a tenant for life in possession, with remainder over in tail, of course no other tenant to the *præcipe* was required to be made, in order to effect a voucher of the

(*p*) Vide sup. p. 460.

(*q*) Bro. Ab. tit. Taile, 32; Plowd., Manxel's case [8].

[tenant in tail. If Edwards, therefore, were tenant of the freehold in possession, and John Barker were tenant in tail in remainder; here Edwards first vouched Barker, and then Barker vouched Jacob Morland, the common vouchee; who was always the last person vouched, and always made default: whereby the demandant Golding recovered the land against the tenant Edwards, and Edwards recovered a recompense of equal value against Barker, the first vouchee; who recovered the like against Morland, the common vouchee; against whom such ideal recovery in value was always ultimately awarded.]

In all recoveries it was necessary that the recoveree should be seised of the freehold in possession, else the recovery was void (*r*). For all actions to *recover the seisin* (as distinguished from the mere possession) of land were required to be brought against the actual tenant of the freehold; otherwise the suit would lose its effect, since the freehold could not be recovered of him who had it not. And though these recoveries were in themselves fabulous and fictitious, yet it was necessary that there should be *actores fabulæ*, and that these should be properly qualified. And from this doctrine resulted two important corollaries; first, that where the object was to vouch a tenant in tail in possession, instead of bringing the *præcipe* against him, it became necessary that he should previously make a tenant to the *præcipe* in manner already explained,—that is, should convey a freehold estate in possession in the land to some other person, so as to qualify the latter to sustain the character of tenant in the action. And the second consequence was, that a tenant in tail *in remainder*, expectant on an estate of freehold, could not resort to a recovery to bar the entail, without the concurrence of the person in whom that precedent estate was vested; for unless the latter joined in the proceedings, there could be no sufficient tenant to the *præcipe*, he alone possessing the necessary

(*r*) Pigot, 28.

qualification. But the nicety once thought to be requisite in conveying the legal freehold, in order to make a good tenant to the *præcipe*, was lessened by the provision of 14 Geo. II. c. 20 (*s*), to the effect that though the legal freehold were vested in lessees, yet those who were entitled to the next freehold estate in remainder or reversion might make a good tenant to the *præcipe*; and that though the deed or fine which created such tenant were subsequent to the judgment of recovery, yet if it were in the same *term*, the recovery should be valid in law;—and that though the recovery itself did not appear to be entered, or were not regularly entered on record, yet the deed to make a tenant to the *præcipe*, and to declare the uses of the recovery, should, after a possession of twenty years, be sufficient evidence on behalf of a purchaser for valuable consideration, that such recovery was duly suffered. In addition to which, provision was at a later period made by 3 & 4 Will. IV. c. 74, establishing the validity of recoveries that had been suffered previously to the statute in several other cases where they were before subject to some fatal objection (*t*).

The effects of a recovery suffered in due form were these:—

1st. It operated to pass to the recoveror an estate in fee simple absolute; and thereby to bar not only the estate tail itself, but all remainders and reversions expectant thereon, and all executory limitations and conditions whatever, to which it had been subject (*u*). This was not by virtue of any legislative enactment, but by construction of the courts of law, as explained more at large in a former chapter; and the reasons which really swayed the judges in allowing this effect to a common recovery, have been also before stated (*x*); but the ground on which they

(*s*) Pigot, 41, &c.; 1 Prest. Convey. pp. 61 et seq.; Taylor v. Horde, 1 Burr. 115.

(*t*) 3 & 4 Will. 4, c. 74, ss. 8, 9, 10.

(*u*) See 2 Bl. Com. 361.

(*x*) Vide sup. 242.

attempted to justify the doctrine was the supposed recompense in value awarded, in the result of this proceeding, to the tenant in tail. For it was said, that any lands which he might obtain from the common vouchee would supply the place of those which he lost by the recovery, and would descend to the issue in tail (*y*). Yet it is obvious that this recompense was merely visionary; and even if realized, it was held that it would not extend to reversioners, nor (in some cases) to those in remainder (*z*); and on the whole, therefore, it is impossible not to concur in the opinion expressed by Chief Justice Willes, that it is futile to endeavour to vindicate the principle of a common recovery (*a*). There were some cases, however, in which this proceeding would not avail for the purpose above described; for by the statute 11 Hen. VII. c. 20, no woman, after her husband's death, unless with the concurrence of those in reversion, could suffer a recovery of lands entailed on her by her husband, or on her and her husband by any of his ancestors; which was called an estate tail *ex provisione viri* (*b*); and by 14 Eliz. c. 8, the like provision applied to the estate of a tenant in tail *after possibility of issue extinct*; and by 34 & 35 Hen. VIII. c. 20, no recovery had against tenant in tail of the king's gift, whereof the remainder or reversion was in the king, could bar such estate tail, or the remainder or reversion of the crown (*c*).

2. A recovery, like a fine, would bind a married woman when she became a party to it with her husband's concurrence; and, as in the case of a fine, she was privately examined by the court in such cases, to ascertain that she acted without compulsion (*d*).

(*y*) 2 Bl. Com. 360.

(*z*) Lacy *v.* Williams, 2 Salk. 569.

(*a*) 1 Wils. 73.

(*b*) 5 Cruise's Dig. 399; Kirkman *v.* Thompson, Cro. Jac. 474.

(*c*) Perkins *v.* Sewell, 1 Bl. Rep.

654; Duke of Grafton *v.* Birmingham Railway Company, 5 Bing. N. C. 27.

(*d*) 5 Cruise, Dig. 392.

3. And lastly, a recovery suffered by a tenant for life worked a forfeiture of the particular estate, and by consequence destroyed all contingent remainders expectant thereon (*e*). It was, however, expressly provided by 14 Eliz. c. 8, that a recovery so suffered, without the consent of the persons in reversion or *vested* remainder, should as against such persons be utterly void.

Having now considered fines and recoveries separately, it will be convenient to consider one incident which was common to both species of assurance, viz., the deed to *lead* or to *declare* their *uses*. For as the most usual fine, that *surcognizance de droit come ceo*, &c., conveyed an absolute estate without any limitations to the cognizee, and as common recoveries conveyed the like estate to the recoveror,—these assurances could not in themselves be made to answer the purposes of family settlements, wherein a variety of limitations is usually intended. The fine or recovery itself was applied, therefore, through the medium of *uses*, to give efficacy to an infinite variety of limitations; and if the deed containing the uses was made previous to the fine or recovery, it was called the deed to *lead* the uses; if subsequent, the deed to *declare* the uses. As if A. (tenant in tail, with reversion to himself in fee) wished to settle his estate on B. for life, remainder to C. in tail, remainder to D. in fee,—he had no power of doing so effectually, while his own estate tail was in being. He therefore usually, after making the settlement proposed, covenanted to levy a fine to (or if there were any intermediate remainders, to suffer a recovery in favour of) E., and directed that the same should enure to the uses in such settlement mentioned; and the fine when levied, or the recovery when suffered, would enure to the uses so specified, and no other; and these uses were executed immediately by force of the Statute of Uses (*f*). Or, if a fine or recovery were had

(*e*) Doe *d.* Davies *v.* Gatacre, 5 (*f*) 2 Bl. Com. 363.
Bing. N. C. 609.

without any previous settlement, and a deed were afterwards made between the parties, *declaring* the uses to which the same should be applied; this would be equally good as if it had been expressly levied or suffered in consequence of a deed directing its operation to those particular uses; for by the statute 4 & 5 Anne, c. 3, indentures to declare the uses of fines and recoveries, made *after* the fines and recoveries had and suffered, were made good and effectual in law; and the fine and recovery were to enure to such uses accordingly.

The cumbrous fictions, of which a slender abstract only has been now given, constituted, in actual practice, a branch of conveyancing of the most intricate and costly character; yet, although it had been suggested that recoveries might be advantageously abolished, and the tenant empowered to bar his estate tail, by the more simple expedient of a solemn deed to be enrolled in a court of record (*g*), it was not until a comparatively recent period that this simplification was effected, that is to say, not until the statute 3 & 4 Will. IV. c. 74, was passed “For the abolition of Fines and Recoveries, and for the substitution of more simple modes of Assurance,”—by which statute it was enacted, that after the 31st December, 1833, no fine should be levied or recovery suffered of lands of any tenure, with the exception of such as should then be in actual progress (*h*); and the statute then proceeded to provide new methods for effectuating, in future, such of the results of these assurances as it was deemed right to preserve, viz., the barring of estates tail, and the passing or binding of the estates or interests of married women.

And, firstly, with reference to the barring of estates tail, the statute provides in substance as follows (*i*):—That every actual tenant in tail (*k*), whether in possession, remainder, contingency or otherwise, shall have full power (subject to

(*g*) 2 Bl. Com. 360.

(*h*) 3 & 4 Will. 4, c. 74, s. 2.

(*i*) Ibid. s. 15.

(*k*) The “actual tenant in tail” is “the tenant of an estate tail which shall not have been barred.”

the provisions hereinafter mentioned as to *protectorship*) to dispose of the lands entailed, for an estate in fee simple absolute, or for any less estate, as against all persons claiming under the estate tail, or in respect of any ulterior estate (*l*) ; and such disposition may be made by any of the assurances (a will only excepted) which would have sufficed for the purpose, supposing the estate to have been a fee simple absolute ; so that the disposition be an actual conveyance, and not one resting in contract only, and so that it be by deed, and enrolled in Chancery (now the Central Office) within six calendar months after execution (*m*). An estate tail in lands of freehold tenure—for copyholds are not to our present purpose—may now consequently be barred as against the grantor himself, the issue in tail, and all others in remainder, reversion, or other expectancy (subject to the provisions as to protectorship before referred to), by any of the conveyances (whether at common law or under the Statute of Uses) which have been discussed in former chapters ; always supposing such conveyance to be by deed, and that the deed is duly enrolled within the time limited in that behalf. Supposing the enrolment made in due time (*n*), the deed takes effect from the execution (*o*) ; but a subsequent deed, if first enrolled, will be entitled to priority (*p*) ; and a bargain and sale, if enrolled under the 3 & 4 Will. IV. c. 74, need not also be enrolled under the Statute of Inrolments (*q*).

To understand the provisions as to protectorship, we must recollect, that though, by a fine, the issue might always be barred at pleasure, a common recovery (which alone barred those in remainder or reversion) was ineffectual when suffered by a tenant in tail not having an estate of freehold in possession, unless he obtained the concurrence of the person in whom the freehold in possession

(*l*) In this provision, the *crown* is expressly included (sect. 15).

(*m*) Sects. 40, 73.

(*n*) 3 & 4 Will. 4, c. 74, s. 41.

(*o*) Sect. 74.

(*p*) *Ib.d.*

(*q*) Sect. 41.

was vested. Now this check would have been entirely taken off, if the new statute, in abolishing recoveries, had proceeded simply to provide that the tenant in tail might, in future, bar all parties, through the medium of a deed enrolled. But it was not the design of the legislature to go so far; and for the purpose of affording protection to family settlements, in which (we may remember) it is usual to vest in the parent a life estate and to limit estates in remainder to the sons successively in tail, expectant on the determination of such life estate, it was deemed expedient that the substitute for a common recovery should be subjected to a check of the like description as the common recovery itself; and it was therefore enacted (*r*), that no disposition, by a person who was tenant in tail under a settlement, should be effectual under the Act to bar any person but those claiming by force of the entail, unless it was made with the consent of the person who (within the meaning of the Act) was “owner” of the first estate of freehold, (or for years determinable on a life or lives,) prior to the estate tail (*s*): and the person whose consent was thus required, received the appellation of *protector of the settlement*. This provision, however, it is material to remark, is expressly confined to the case where the prior estate is created *by the same settlement* as the entail: for where it is constituted by a different assurance, the Act leaves the tenant in tail to the free exercise of his power of disposition; but an estate created by appointment, under a power in the settlement (sect. 1); an estate confirmed or restored by the settlement (sect. 25); an estate resulting to the settlor (sect. 22); and an estate by the curtesy, in respect of the estate tail, or of any prior estate created by the same settlement (sect. 22),—are, respectively, to be considered as “*created by the settlement*.”

Where an assurance is executed by a tenant in tail, in such form and with such attendant ceremonies as the

(*r*) 3 & 4 Will. 4, c. 74, s. 34.

(*s*) Sect. 22.

statute requires, it passes an indefeasible estate in fee simple absolute, or for life, or years, or otherwise, according to the nature of the limitation. But if it be executed without the consent of the protector, in a case where a protector exists (*t*), its effect is only to bar the tenant and his issue in tail, and the rights of other persons claiming in expectancy on the estate tail are not affected (*u*). An assurance purporting to be in fee simple absolute, will therefore in such a case convey no more than a base fee determinable on the failure of issue (*x*): though it is in the power of the tenant, by afterwards obtaining the consent of the protector, and making a new disposition thereon, or by confirming his former disposition when the protectorship has ceased, to enlarge such base fee into a fee simple absolute (*y*). And in the particular case, when, for want of the protector's consent, such base fee is created, and the immediate remainder or reversion in fee happens also to become united in the same person with the base fee,—the latter will, without any such consent or new disposition, enlarge *of itself* into a fee simple absolute (*z*). But whether the bar effected be general or partial only in its nature, it is to be understood that in all cases it operates without prejudice to the interests of other parties not claiming by force of, or in expectancy upon, the entail; and consequently it leaves all estates *prior* to the estate tail undisturbed (*a*).

Although, in general, the “owner” of the first prior estate (being of the kind already described) is made the protector of the settlement, yet we may remark, that there are many cases in which the qualification for the protectorship is subject to more specific provision. For first, in certain cases arising on or before 31st December, 1833 (the date from which fines and recoveries were abolished), the

(*t*) Bell *v.* Holtby, Law Rep., 15
Eq. Ca. 178.

(*u*) Sects. 15, 34.

(*x*) Sect. 1.

(*y*) Sects. 19, 35.

(*z*) Sect. 39.

(*a*) Sects. 15, 19.

person, who, under the old law, would have been the proper party to make a tenant to the *præcipe*, is now, without regard to any other rule of qualification, to be the protector (*b*); and in other cases, the Act provides, that the first prior estate of freehold or of years determinable on life or lives, shall not avail to confer the protectorship on any person, who takes that estate as lessee at a rent; or as dowress, bare trustee, heir, executor, administrator, or assign (*c*),—with the exception, however, as to bare trustees, of such as, under any settlement made before the Act, would have been the proper parties to make a tenant to the *præcipe* (*d*)—the office being, in every case of exclusion, cast upon the owner of the *next* estate (if any) qualified to constitute a protectorship (*e*). Nor is the creation of the office always by the mere act of law; for the settlor himself is entitled, in the settlement creating the entail, to appoint any person or persons *in esse* (not exceeding three in number) to act in this capacity (the tenant of the prior estate being included in the number or not, at the pleasure of the settlor); and also to insert in the deed a power for the substitution of others, in the event of the death or retirement of those originally nominated (*f*).

The office is intended to be in every case a *personal* one; and therefore a protector does not lose his right to act in that capacity by a transfer of the estate in virtue of which it was acquired; whether that transfer takes place by his own alienation, or by his other act or default (*g*). But when the person who would otherwise be protector is incompetent by reason of insanity, the Lord Chancellor (or other person deputed to exercise the royal functions with respect to idiots and lunatics) is to become protector in his stead: and where he who would otherwise be protector is disabled by treason or felony, the office is

(*b*) 3 & 4 Will. 4, c. 74, ss. 29,
30, 31.

(*c*) Sects. 26, 27.

(*d*) Sect. 31.

(*e*) Sect. 28.

(*f*) Sect. 32.

(*g*) Sect. 22.

vested in Chancery ; to which latter jurisdiction it is also confided in some other particular cases (*h*). A married woman is competent to be protector ; and if the prior estate, in respect of which she becomes so, is settled to her separate use, she is to hold the office independently of her husband, but where not so settled, in conjunction with him only (*i*). We may remark, too, that the office is in every case of a purely discretionary character ; so that the protector is absolutely free from all control in its exercise, and cannot, even by his own previous agreement, fetter his free agency in this respect (*k*). And lastly, with regard to the consent which it is thus absolutely in his power to grant or to withhold,—that it may either be given by the same instrument which makes the disposition, or by a separate one to be executed on or before the same day with the other, and to be duly enrolled : and that when once given, the consent is incapable of being revoked (*l*).

It is not only on *legal* estates that an assurance under the statute in question will operate, nor in respect of these only that its operation was required. It is indeed generally true, that an *equitable* estate will pass by any instrument sufficient to indicate the intention of the grantor ; but such estates when entailed are exceptions to this rule, and cannot be transferred except by the appropriate methods, and it was in fact the practice, before the statute passed, to convey entailed equitable interests through the medium of fines and recoveries (*m*) ; which, though always transacted in a common law court (*viz.* the Common Pleas), were considered in equity as legitimate assurances for the purpose. Thus, if lands were given to the use of A. in fee, in trust for B. in tail, with remainder over,—a fine levied or recovery suffered by B. in the Common Pleas, was recognized

(*h*) Sects. 33, 48 ; In re Wainwright, 13 Sim. 260.

(*i*) Sects. 24, 45, 79.

(*k*) Sects. 36, 37.

(*l*) Sects. 42, 44, 46.

(*m*) 5 Cruise, Dig. 301, 461 ; Boteler v. Allington, 1 Bro. C. C. 72.

in the courts of equity as a bar to his equitable estate: that is, a bar to the extent to which the same assurance would have operated on a legal estate of the same description (*n*). By the Act for abolishing fines and recoveries, a similar effect now belongs to the substituted assurance; the word “estate” being used throughout the Act “to express an estate in equity, as well as at law” (*o*). The statute is also framed to take effect not only on actual entails, but upon money liable to be converted into land; as where trustees are directed to invest money in land, which, when purchased, is to be settled in tail; or to sell entailed land and to invest the produce in like manner; for with respect to trusts of this description, the statute provides, that its provisions shall be applicable (so far as circumstances will permit) to the monies so to be invested, in the same manner as they would apply to the lands to be purchased, supposing the same to be actually purchased and settled conformably to the trust; but any disposition of such monies by the tenant in tail must be made, not by a conveyance appropriate to the passing of the realty, but by a deed of assignment inrolled in Chancery within six calendar months after the execution (*p*).

Secondly, with reference to the passing or binding of the estates or interests of married women, the statute provides,—generally, that a feme covert shall be as competent as if she were a feme sole, to dispose by deed of lands of any tenure, or of money subject to be invested in the purchase of lands—and also to extinguish any estate which she, (or she and her husband in her right,) may have, or any power which may be vested in her, in regard to lands or to money of that description;—provided always that her husband shall concur in the deed (*q*); and provided also that upon the execution thereof, or at some time

(*n*) *Doe d. Cadogan v. Ewart*,
7 Ad. & El. 636.

(*o*) 3 & 4 Will. 4, c. 74, s. 1.

(*p*) Sect. 71.

(*q*) Sect. 77.

afterwards, she shall produce the same and acknowledge it before the proper authorities (*r*). The acknowledgment may be taken either before one of the judges (*s*), or before two (now one) of the commissioners from time to time appointed for that purpose (*t*), or before a judge of a county court (*u*); and it is the duty of such authorities, before they receive her acknowledgment, to examine the woman apart from her husband, in order to ascertain her free and voluntary consent; and in the absence of such consent, the acknowledgment is to be rejected, and the deed becomes void, as far as relates to her execution (*x*). Supposing the acknowledgment on the other hand to be received, a memorandum of the fact was to be written on the foot or margin of the deed; and a certificate thereof was to be also drawn up and signed on a separate piece of parchment, and verified by affidavit; and the certificate and affidavit were then to be filed of record in court; and until so recorded, the deed had no effect as regards the party under coverture (*y*); but, when the record was complete, it operated to affect her interest, (by relation,) as from the time when it was acknowledged. But now as regards the deeds of married women executed after the 31st December, 1882, and requiring to be acknowledged by them, it appears that the memorandum of acknowledgment simply is written at the foot or in the margin of the deed; and the matter is therewith complete, no certificate or affidavit, or any recording of either, being required (*z*). When the object of the disposition is to bar the estate *tail* of a married woman, the same course of proceeding is to be observed as in the case of other tenants in tail; and the ceremony of acknowledgment is to be superadded (*a*).

(*r*) Sect. 79.

(*s*) Sect. 80.

(*t*) 45 & 46 Vict. c. 39 (Conveyancing Act, 1882), s. 7.

(*u*) 19 & 20 Vict. c. 108, s. 73.

(*x*) 3 & 4 Will. 4, c. 74, s. 80.

(*y*) *Jolly v. Handcock*, 7 Exch. 820.

(*z*) Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 7.

(*a*) 3 & 4 Will. 4, c. 74, ss. 40, 79.

The proceedings relative to acknowledgment are made subject, as to some of their details, to the regulation of the Common Pleas (*b*) and now of the High Court; and the court is also empowered by order, in a summary way upon the application of the wife, and upon such evidence as to the court shall seem meet, to dispense (in every case where it shall appear reasonable to do so) with the concurrence of the husband in her acts, whether in barring an estate tail, or in executing a deed for any other purpose (*c*), saving nevertheless such rights as the husband may possess independently of the Act (*d*).

Such, then, are the substitutes for the old fines and common recoveries; and before leaving them, it will be useful to advert to some specific points of difference between the present and the former system. And, first, the most obvious improvement in the modern system is, that, instead of applying modes of assurance altogether peculiar and anomalous, to the case where a tenant in tail or a married woman is the conveying party, the law now enables them to pass their interests, by an instrument of the same description (in general) as is used in other alienations of real estate; and thus establishes a greater uniformity in the methods of conveyance. The modern substitutes are also clearer and simpler than those which they have superseded; and they are considerably less expensive, the charges connected with fines and recoveries (particularly the latter) having been so high as to have formed one of the most prominent reasons for their abolition. And under the modern system, there is no such uncertainty as to who is the protector,—when there is a protector,—as there used, at least occasionally, to be under the old system in respect of the proper person to make a

(*b*) Sect. 89.

(*d*) 3 & 4 Will. 4, c. 74, s. 91;

(*c*) Sect. 91; *Re Alice Rogers*, Fowke v. Draycott, 29 Ch. Div. Law Rep., 1 C. P. 47; *Goodchild* 996.
v. Dougal, 3 Ch. D. 650.

tenant to the praepice; for now the protector is readily ascertained, being always constituted (where he is constituted at all), by the same settlement as the tenant in tail. And, lastly, these modern assurances, whether disentailing deeds or deeds acknowledged, may be executed at any time that convenience may suggest; which was not the case with the old fine, and particularly with the old recovery; for that could not be transacted except during the *law term*, when the Court of Common Pleas was open; from which circumstance it not infrequently happened that the deaths of parties would intervene to prevent the intended recovery, and to defeat for ever the purposes which it was designed to effectuate.

CHAPTER XX.

OF THE CONVEYANCE BY DEVISE.



THE modes of assurance hitherto examined, have all been of the kind which operate from the time of the execution of the instrument (*a*) : but there is another (and it is the last conveyance of the ordinary kind to be considered), which operates from a different time, namely the *devise*, or assurance, by will ; for a will is of no force until after the death of the testator, being merely *ambulatory* during his life, that is to say, of an unsettled or unsteady and fluctuating character,—“ *Omne testamentum morte consummatum est, et voluntas testatoris est ambulatoria usque ad mortem* (*b*). ”

[*Will and testament* are terms generally used without distinction, to express the instrument by which a man makes a voluntary disposition of his property, to take effect after his death. According to the old Roman law, a will or testament was “ *voluntatis nostræ justa sententia, de eo quod quis post mortem suam fieri velit* (*c*),—*sententia* denoting the circumspection and prudence with which it was supposed to be made ; *voluntatis nostræ sententia* denoting that it declared the testator’s intention or emphatically his *will* ; *justa sententia* denoting that it was drawn, attested, and published, with all due solemnities and forms of law ; and *de eo quod quis post mortem suam fieri velit*, denoting that it was of no force until after

(*a*) Shelford on Wills, 5.

(*c*) Ff. 28, 1, 1.

(*b*) Co. Litt. 112.

[the death of the testator.] The term *codicil* is a cognate term, derived from the Latin *codicillus* (importing a little book or writing); and it is an instrument made subsequently to the will, and by which the dispositions of the will are added to, taken from, or otherwise altered; and it is like the will in most respects, of which indeed it is considered as forming a part; so that what may be laid down as law regarding a will, may be taken generally as applicable also to every codicil thereto (*d*).

[With respect to the principle on which a disposition by will is allowed, it was clearly necessary, for the peace of society, that the occupancy which conferred the original title, should be recognized as capable of continuation after the death of the first proprietor; and for this purpose the law of most civil societies has therefore given to the first proprietor and to each of his successors the right of continuing his property, after his death, in such persons as he shall name (*e*). Therefore we find that testaments are of great antiquity; for passing over the doubtful case of Abraham (*f*),—which by some writers has been taken to show an absence of the power of testamentary disposition (*g*), and passing over the will of Noah whereby (according to Eusebius and others) he disposed of the whole world (*h*), a much more authentic instance of the early use of testaments may be found in the sacred writings, wherein Jacob bequeaths to his son Joseph a portion of his inheritance, double to that of his brethren (*i*): which bequest we find carried into execution many hundred years afterwards, when the posterity of Joseph were divided into two distinct tribes (those of Ephraim and Manasseh), and had two several inheritances assigned to them; whereas the descendants of each of the other patriarchs formed only one

(*d*) 2 Bl. Com. 500; Anderson
v. Anderson, Law Rep., 13 Eq.
Ca. 381; Green v. Tribe, 9 Ch. D.
231.

(*e*) Puff. L. N. lib. 4, c. 10.

(*f*) Genesis, c. 15.

(*g*) Taylor, Elem. Civ. Law, 517.

(*h*) Seld. de Succ. Eb. c. 24.

(*i*) Genesis, c. 48.

[single tribe, and had only one inheritance. Solon is said to have been the first legislator who introduced wills into Athens (*k*), but in many other parts of Greece they were totally discountenanced (*l*). In Rome, they were unknown until the laws of the Twelve Tables (*m*): and among the Northern nations, particularly among the Germans, testaments were not in use (*n*). All which variety of use or custom may serve to show that the right of making wills and disposing of property after death, was merely a creature of the civil state, which has permitted it or has denied it according as its varying political circumstances appeared to dictate; and even where it is permitted by law, it is subjected to different formalities and restrictions in almost every state.]

In this country, both real and personal estate have long been capable of transmission by will, and a modern statute (7 Will. IV. & 1 Vict. c. 26), to which we shall soon have occasion more particularly to refer, confirmed the power, and placed it, for the future, on a somewhat altered basis. As regards personal estate, that will be considered in the second volume of this treatise; for the present we shall confine ourselves to real estate and to lands of freehold tenure, lands of copyhold tenure being reserved until hereafter.

To obtain a clear idea of the law of *devise*,—it will be desirable to consider under separate heads:—I. The power of devise itself,—to what persons it belongs, and to what estates and interests it applies. II. The solemnities which attend the execution, revocation, and revival of a will. III. The rules of construction to which devises are subject. IV. The operation of a devise in conveying or limiting real estate.

I. [As to the power of devising,—it seems that, at a period antecedent to the Conquest, lands were devisable

(*k*) Plutarch in Vitâ Solon.

(*m*) Inst. 2, 22, 1.

(*l*) Pott. Antiq. l. 4, c. 15; Hermann's Antiq. s. 20.

(*n*) Tacit. de Mor. Germ. 20.

[in this country (*o*); but that upon the introduction of the military tenures, a restraint on devising lands naturally followed as a branch of the feudal doctrine of non-alienability without the consent of the lord. So that *after* the Conquest, no estate greater than for term of years could be disposed of by testament (*p*),—except only in Kent and in some antient boroughs, and in a few particular manors, where the old Saxon immunities continued by special indulgence to subsist (*q*). And though the feudal restraint on alienation by deed vanished very early, yet the restraint on alienation by will continued for some centuries after (*r*); but when, in due course, uses were invented, they began to be devised (*s*); and the devisee of the use could, in Chancery, compel its execution. Then came the Statute of Uses (27 Hen. VIII. c. 10), by the effect of which these uses became legal estates, and ceased to be devisable; whereupon by the old *Statute of Wills*, passed about five years after—viz. 32 Hen. VIII. c. 1 (explained by 34 & 35 Hen. VIII. c. 5)—it was enacted that all persons being seised in fee simple (except *femes covert*, infants, idiots, and persons of non-sane memory,) might by will and testament in writing devise to any other person, (except to bodies corporate,) *two-thirds* of their lands, tenements, and hereditaments held in chivalry, and the *whole* of their lands held in socage; and this partial power of devising lands became of course complete upon the alteration of tenures effected by the statute of Charles the second, whereby *chivalry* was converted into *socage* (*t*).]

A devise under these statutes took effect, not only upon legal, but also upon equitable estate. The statutes did not, however, apply to the *chattels* of the testator, whether

(*o*) Wright's Ten. 172.

(*p*) 2 Inst. 7.

(*q*) Litt. s. 167; Co. Litt. 111.

Vide Rob. Gavel. 235.

(*r*) Glan. lib. 7, c. 1.

(*s*) Plowd. 414; Gilb. on Devises, 7.

(*t*) Butler and Baker's case, 3 Rep. 25; Arthur v. Bokenham, 11 Mod. 148; Wyndham v. Chetwynd, Burr. 420.

consisting of terms of years in land, or of things personal ; for the aid of the legislature was not in the time of Hen. VIII. required as to these ; as we shall have occasion to show more particularly in a subsequent part of the work. But the devise was inoperative, unless the land belonged to the testator at the time of making his will ; in other words, lands acquired after the making (*i.e.*, the execution) of the will were incapable of passing under the devise ; and if the testator was desirous of including such lands in his testamentary dispositions, a new will or codicil, or a re-execution of the existing will, was required for the purpose (*u*) ; in all which respects a will of lands was different from a will of goods.

And with regard to the persons capable of becoming devisees, the statutes of Hen. VIII. expressly excepted corporations, which was done to prevent the extension of gifts in mortmain ; but it was afterwards held, that a devise to a corporation for a *charitable* use was valid, as operating in the nature of an appointment, rather than as a bequest (*x*) ; however, by the statute 9 Geo. II. c. 36, all devises to charitable uses were made void, with the few exceptions we have already noted in a former place.

Such was the power of devising as it existed at the date of the 7 Will. IV. & 1 Vict. c. 26 ; and thus it still stands with respect to all wills made before 1st January, 1838 : but as to all wills executed on or after that day, the law must now be looked for in the provisions of that statute, and which is often called “The New Wills Act” in contradistinction to the older statute ; and the new Act has enacted that (with the exceptions presently to be noticed) it shall be lawful for any person (being of full age, and if a female being unmarried) to dispose by will of all real and personal estate, legal or equitable, to which he or she shall be entitled at the time of death, and which, but for such

(*u*) 2 Bl. Com. 378 ; *Langford v. Roe*, 8 Ad. & El. 14.
 Pitt, 2 P. Wms. 629 ; *Marston v.* (*x*) 2 Bl. Com. 375.

disposition, would pass to the heir at law; and the Act expressly extends this power of disposition to an estate held *pur autre vie*; and to any contingent, executory, or other future interest; and even to a right of entry upon land, a class of interest previously regarded as incapable of being devised (*y*). The power is also expressly extended to after acquired property, by a provision that all real estate, to which the testator is entitled at the time of his death, shall pass by his will, notwithstanding that he may become entitled to the same subsequently to the execution of the will (*z*). And there being no exception in the Act with regard to corporations, a devise even to a body corporate is now valid, subject to the Statutes of Mortmain, by which corporations are required to obtain the crown's licence, to enable them to become the *holders* of land; but of course, the prohibitions contained in the 9 Geo. II. c. 36, as to a devise to *charitable* uses remained in force, and (subject only to the relaxations contained in the Mortmain Act, 1891) still remain in force, as expounded in a previous chapter (*a*). On the other hand, the Act contains an express exception to the power of devising, in reference to married women and infants—the first being only allowed to make a valid disposition in cases in which they might have done so before the Act (*b*), and minors being made wholly incompetent—and to these we must of course understand the exception to be tacitly added which would be introduced by the general rules of law, in respect of idiots, insane persons, and others labouring under personal incapacity to convey in any manner whatever (*c*). But as regards married women, it must be known that they might

(*y*) *Doe v. Tomkinson*, 2 Mau. & Sel. 165; *Goodright v. Forrester*, 8 East, 552.

(*z*) 7 Will. 4 & 1 Vict. c. 26, s. 3; *Marston v. Roe*, 8 Ad. & El. 14.

(*a*) *Vide sup.* pp. 434—436.

(*b*) 7 Will. 4 & 1 Vict. c. 26, ss. 7, 8; *Forse and Hembling's*

case, 4 Rep. 60 b; *Johns v. Dickinson*, 8 C. B. 934; *Taylor v. Meads*, 34 Law Journ. N.S. (Ch.) 203; *Pride v. Bubb*, Law Rep., 7 Ch. App. 64.

(*c*) *Smith v. Tebbitt*, Law Rep., 1 P. & D. 398; *Banks v. Goodfellow*, ib. 5 Q. B. 549.

always dispose of their separate real estates by will ; and also that they might always, in execution of a power of appointment, dispose of real estates by will ; and we shall hereafter see, that under the various Acts relating particularly to the separate estates of married women (*d*) they now have, as regards their separate estate, the fullest powers of devise as indeed of alienation generally.

II. The solemnities which attend the execution, revocation, and revival of a will.—When the Statute of Wills (32 Hen. VIII. c. 1) for the first time gave efficacy to devises of the realty, innumerable frauds and perjuries were introduced ; and this need occasion no surprise, for at that time bare notes, in the handwriting of the party, became good wills within the statute if only *published* by him as such ; that is, if only declared by the testator to be intended to operate as his last will and testament (*e*) ; and except *publication*, no other ceremony had been essential to a written will of personalty (*f*) ; and the old Statute of Wills prescribed no particular solemnity in reference to devises of real estate, except that it required the will to be *in writing*. [To remove all which opportunities for fraud, the *Statute of Frauds and Perjuries* (29 Car. II. c. 3) directed, amongst other things, that devises of lands and tenements should not only be in writing, but should be signed by the testator, or by some other person for him in his presence and by his express direction (*g*) ; and should also be subscribed, in his presence, by three credible witnesses (*h*). And a solemnity nearly similar was, by the same Act (sect. 6), made requisite for *revoking* devises (*i*) ; though the same might

(*d*) 56 & 57 Vict. c. 63, amending 45 & 46 Vict. c. 75, and extending s. 24 of the New Wills Act to the will of a married woman.

(*e*) 2 Bl. Com. 376.

(*f*) Doe v. Sir F. Burdett, 4 Ad. & El. 14.

(*g*) Baker v. Denning, 8 Ad. & El. 94.

(*h*) Roberts v. Phillips, 4 Ell. & Bl. 450.

(*i*) Swinton v. Bailey, 1 Ex. D. 110.

[be also revoked by the burning, cancelling, tearing, or obliterating thereof by the devisor, or in his presence, and with his consent, by any other person, if done *animo revocandi* (*k*): as it might also be, impliedly, by any new modification of the interest of the devisor in the estate devised (*l*); or by such a great and entire alteration in circumstances as arose from his marriage and the birth of a child (*m*), or, in case of a woman, by her marriage simply (*n*).] But in the construction of the Statute of Frauds, it was settled that the testator's name, written with his own hand at the beginning of his will, as "I, John Mills, do make this my last will and testament," was a sufficient signing, if intended as such by the testator (*o*); and it was also adjudged, that though the witnesses must all see the testator sign, or at least see him acknowledge his signature, yet they need not all be present at the same time (*p*); though they must all subscribe their names *in his presence*, lest by any possibility they should mistake the instrument (*q*). And the judges were extremely strict in regard to the credibility, or rather the competency, of the witnesses; for they would not allow any legatee, nor, by consequence, a creditor by simple contract, where the legacies and debts were charged on the real estate, to be a competent witness to the devise, as being too deeply concerned in interest that the will in question should be established (*r*). For, in that case, the witness gained a security for his legacy (or debt) from the real estate; whereas otherwise, as the law then stood, he had no claim but on the personal assets. [This determination, however,

(*k*) *Andrew v. Motley*, 12 C. B. N. S. 514.

(*l*) *Sparrow v. Harcastle*, 3 Atk. 802.

(*m*) *Re Cadywold*, 1 Swab. & Trist. 34; *Blackstone*, vol. ii. p. 502.

(*n*) *Forse & Hembling's case*, 4 Rep. 60 b.

(*o*) 2 Bl. Com. by Chitty, 376, n. (6).

(*p*) *Freem.* 486; 2 Ch. Ca. 109; *Prec. in Ch.* 185.

(*q*) *Longford v. Eyre*, 1 P. Wms. 740.

(*r*) *Holdfast v. Dowsing*, *Str.* 1253.

[alarmed many purchasers and creditors, and threatened to shake most of the titles in the kingdom, that depended on devises by will. For if the will was attested by a servant to whom wages were due, by the apothecary or attorney whose very attendance made them creditors, or by the minister of the parish who had any demand for tithes or ecclesiastical dues (and these are the persons most likely to be present at the testator's last illness), and if, in such case, the testator had charged his real estate with the payment of his debts,—every disposition in the will, so far as it related to real property, would have been utterly void. This occasioned the statute 25 Geo. II. c. 6, which restored both the competency and the credibility of such legatees, by declaring void all legacies given to witnesses, and thereby removing all possibility of their interest affecting their testimony,—the same statute likewise establishing the competency of creditors, by directing the testimony of all such creditors to be admitted,—leaving their credit, (like that of all other witnesses,) to be considered on a view of all the circumstances, by the court and jury before whom such will should be contested (*s*).]

Such is still the law as to the execution and attestation required for wills made before 1st January, 1838 (*t*); but the provisions previously in force are, by 7 Will. IV. & 1 Vict. c. 26, repealed as to all wills made *on or after* that date (*u*), or re-executed or by codicil revived after that date (*x*); and it is now enacted (*y*), that no will (whether operating on real or on personal estate, or on both) shall be valid (*z*), unless it be in writing, and signed at the foot

(*s*) Cresswell *v.* Cresswell, Law Rep., 6 Eq. Ca. 69.

(*t*) 7 Will. 4 & 1 Vict. c. 26, s. 34.

(*u*) Sect. 2.

(*x*) Doe *v.* Walker, 12 Mee. & W. 591; Winter *v.* Winter, 5 Hare, 306; Croker *v.* Hertford, 4 Moore's P. C. Cases, 339.

(*y*) Sects. 9, 11.

(*z*) With regard, however, to wills of *personalty* made by *soldiers* or *seamen* on actual service, and the distribution of their effects when intestate, see 29 Car. 2, c. 3, s. 22; 17 & 18 Vict. c. 104, ss. 194—204; 28 & 29 Vict. cc. 72, 111; and (as

or end thereof (*a*) by the testator or some other person, in his presence, and by his direction, such signature being also made or acknowledged by him, in the presence of *two* or more witnesses present at the same time, and such witnesses attesting and subscribing the will in his presence (*b*). Where these requisites, however, are complied with, no other is now imposed by law; and the statute expressly enacts that no *publication*, other than that which is implied in the execution so attested, shall in future be necessary; and the statute has also expressly enacted, that wills executing powers of appointment shall be attested in the same manner, and being so attested shall be sufficiently attested (*c*).

The former provisions with respect to the competency of witnesses having an interest, are also repealed as to wills taking effect under the new law (*d*); and the new enactments on this subject are, first, that the incompetency of any attesting witness shall not invalidate the will; secondly, that any beneficial gift or appointment by the will to an attesting witness, or to the husband or wife of an attesting witness, (except a charge for payment of debts,) shall be void, and the evidence of the witness admissible; thirdly, that where land is charged by the will with payment of debts, and the creditor (or husband or wife of the creditor) is an attesting witness, such witness shall nevertheless be competent; fourthly, that no person shall be incompetent as a witness, on account of his being an executor of the will. These enactments, however, are now of the less importance, as by the subsequent statutes of 6 & 7 Vict. c. 85, and 14 & 15 Vict. c. 99, the objection to

regards the preferential payment of regimental debts) 56 & 57 Vict. c. 5.

(*a*) 15 & 16 Vict. c. 24; *Re Peach*, 1 Swab. & Trist. 138; *Trott v. Skidmore*, 2 Swab. & Trist. 12; *Re Williams*, Law Rep., 1 P. & D. 4.

(*b*) *In re William Frith*, 1 Swab. & Trist. 8; *Charlton v. Hindmarsh*, 8 H. of L. Ca. 160.

(*c*) 7 Will. 4 & 1 Vict. c. 26, s. 10.

(*d*) *Ibid.* ss. 14, 15, 16, 17.

a witness on the ground of *interest*, (which once applied generally in our law, and not merely in the instance of wills,) is in all cases taken away; but of course, the gift to an attesting witness or to the husband or wife of an attesting witness still remains void (*e*).

As to revocation, also, the former law was altered by the New Wills Act; and it is provided (by sect. 18), that every will taking effect under this statute shall be revoked by *the marriage* alone either of a testator or of a testatrix—unless, indeed, such will was made in exercise of a power of appointment, and in a case where the estate would not have passed, in default of appointment, to his or her representatives; but that, on the other hand, no will shall be revoked by any presumption of an intention to revoke, raised by any alteration in circumstances or otherwise, except only by the circumstance of marriage (*f*); and no alienation of the property devised will prevent the devise taking effect on any estate disposable by the testator at his death (*g*). A revocation may, however, take place by the execution of another will or of a codicil, or of some writing of revocation executed like a will, or by the burning, tearing, or other destruction of the original will (*animo revocandi*), by the testator or by some person in his presence and by his direction (*h*); and with respect to obliteration or other alteration made after execution, it is provided, that they are to have no effect (where the original meaning can still be deciphered) unless executed with the same ceremonies as the will itself (*i*); though it will be sufficient if the signature of the testator, and the subscription of the witnesses, be made opposite or near the part

(*e*) *Thorpe v. Bestwick*, 6 Q. B. D. 311; *In re Barber*, 31 Ch. D. 665; *In re Pooley*, 40 Ch. D. 1.

(*f*) 7 Will. 4 & 1 Vict. c. 26, s. 19; *De Pontes v. Kendall*, 10 W. R. 69.

(*g*) 7 Will. 4 & 1 Vict. c. 26, s. 23.

(*h*) 7 Will. 4 & 1 Vict. c. 26, s. 20; *Francis v. Grover*, 5 Hare, 39; *Price v. Powell*, 3 H. & N. 341.

(*i*) *Gann v. Gregory*, 22 L. J. (Ch.) 1059; *Re James*, 1 Swab. & Trist. 238.

altered, or at the foot or end of some memorandum written on the will, and referring to the alteration (*k*); but no letter or memorandum not so signed and witnessed can be regarded (*l*). And so when a will is once revoked, it is not to be *revived* otherwise than by re-execution of the original, or by a codicil duly executed and showing an intention of revival (*m*).

III. The rules of construction, to which devises are subject.—These rules are, in great measure, the same rules of interpretation as apply to conveyances by deed (*n*); but as in making a will, a party is supposed to be *inops consilii* (*o*), there are instances in which the law will carry his intended limitations into effect, though the words used would be insufficient or improper for the purpose in a deed (*p*). Thus, it has always been held that a fee might be conveyed by way of devise without legal words of inheritance, and an estate tail without words of procreation (*q*), provided that other words were used sufficient to indicate the intention (*r*); though in a conveyance by deed, the case used to be otherwise. [So an estate may pass under a will by mere implication, without any express words to direct its course; *e.g.*, where a man devised lands to his heir-at-law, after the death of his wife,—here though no estate was given to the wife in express terms, yet she was held to have an estate for life by implication (*s*); for the intent of the testator was clearly to postpone the heir

(*k*) 7 Will. 4 & 1 Vict. c. 26, s. 21.

(*l*) *McCormick v. Grogan*, 4 App. Ca. 82; *Singleton v. Tomlinson*, 3 App. Ca. 404.

(*m*) 7 Will. 4 & 1 Vict. c. 26, s. 22; *Andrews v. Turner*, 3 Q. B. 177; *Dunn v. Dunn*, Law Rep., 1 P. & D. 277.

(*n*) *Clayton v. Lord Nugent*, 13 Mee. & W. 200; and *vide sup.* p. 469.

(*o*) 2 Bl. Com. 172.

(*p*) Co. Litt. by Butler, 272 a, n. (1); *Slater v. Dangerfield*, 15 Mee. & W. 263.

(*q*) *Doe v. Bannister*, 7 Mee. & W. 298; *Lewis v. Puxley*, 16 Mee. & W. 733.

(*r*) *Lloyd v. Jackson*, Law Rep., 2 Q. B. 269.

(*s*) 1 Vent. 376.

[until after her death ; and if she did not take it, nobody else could. So also, where a devise was of Blackacre to A. in tail, and of Whiteacre to B. in tail, and if they both died without issue, then to C. in fee :—here it was held that A. and B. had *cross-remainders* by implication ; and that on the failure of the issue of either, the other or his issue would take the whole, and C.'s remainder over would be postponed till the issue of both had failed (*t*). But where such implications are allowed, they must be such as are necessary, or at least highly probable, and not merely possible implications (*u*).] There is also this difference between deeds and wills in point of construction, that supposing a will to contain two inconsistent clauses, that which comes last in order shall prevail (*x*) ; though in a deed the preference is, as we have seen, due to that which comes first.

A devise also is subject to a less strict rule than a conveyance by deed, in respect of the description of the thing granted. Thus, if I convey my house by deed, without any specification of land, we have seen that no land can pass, except the orchard, garden and curtilage ; but the question what shall pass by the *devise* of a house (or of a house “ with the appurtenances ”) is purely a question of intention, to be determined, like other points of construction, by the tenor of the whole will ; and a devise in either form may, under special circumstances, have the effect of passing even adjacent land or buildings (*y*).

There are also some particular points of construction with regard to devises, which have been established by parliamentary enactment. For the former state of the law upon these points, as settled by judicial decisions, having been deemed unsatisfactory, it was thought fit, in the New Wills Act, to regulate them for the future upon different prin-

(*t*) Freem. 484.

& W. 677.

(*u*) Vaugh. 262.(*y*) Webber *v.* Stanley, 16 C. B.,(*x*) Co. Litt. 112 b ; Plowd. 541 ; N. S. 698.Doe *d.* Spencer *v.* Pedley, 1 Mee.

ciples. The points to which we refer are principally as follows:—

1. As the dispositions made by a testator cannot take effect, and are not intended to take effect, till after his death, it has often become a question whether in his description of the property devised, or of the persons in whose favour he devises, he shall be considered as referring to the state of things which exists when he executes his will, or to that which may exist at the time of his death. As to bequests of personal estate, the rule has always been, that the will speaks as at the time of death: but in devises of the realty, the opposite construction formerly obtained; and the will was held to speak, in general, as at the time of its execution (*z*). But the new statute has now assimilated the construction of *devises* upon this point to that of *personal bequests*; for it provides, “that every will shall be construed, with reference to the
“real estate and personal estate comprised in it, to speak
“and take effect as if it had been executed immediately
“before the death of the testator, unless a contrary intention shall appear by the will” (*a*).

2. Though an estate in fee was always allowed to pass by devise, without apt words of inheritance, provided there were other expressions to show the testator’s intention to confer a fee, yet, prior to the New Wills Act, a long train of judicial decisions had established that a mere devise of a house or land would not suffice to indicate that intention, but would confer only an estate for life (*b*). Thus, if I were seised *in fee* of a house at A., and devised the same to B., adding either the words *and his heirs*, or equivalent words, expressive of an intention that he should take my whole estate therein, the

(*z*) *Lomax v. Holinden*, 1 Ves. sen. 295; *King v. Bennett*, 4 Mee. & W. 36.

(*a*) 7 Will. 4 & 1 Vict. c. 26, s. 24; *Castle v. Fox*, Law Rep.,

11 Eq. Ca. 542; *Everett v. Everett*, 6 Ch. D. 122.

(*b*) *Pickwell v. Spencer*, Law Rep., 6 Exch. 190.

house would pass to him, in either case, in fee ; but if I devised to him such house, without adding *and his heirs*, or using such other equivalent words as above mentioned, he would take an estate in it for his life only (*c*). This rule had always given much dissatisfaction, as establishing a construction contrary to that which common sense presumes to be the real intention of the party (*d*) ; and by 7 Will. IV. & 1 Vict. c. 26, s. 28, it has accordingly been provided, “that where any real estate shall be devised to “any person without any words of limitation, such devise “shall be construed to pass the fee simple, or other the “whole estate or interest which the testator has power to “dispose of by will, in such real estate, *unless* a contrary “intention shall appear by the will.”

3. In devises to *trustees*, it had been a general rule prior to the New Wills Act, that though no words of inheritance were used in the limitation to them, yet they should take such an estate (even to the extent of the whole fee) as might be necessary to enable them to perform the trusts ; but the question often arose, whether in particular instances they would take the fee, or a less estate, and if the fee, whether it would be determinable or not when the trusts were satisfied (*e*). But by 7 Will. IV. & 1 Vict. c. 26, s. 30, a rule of construction has been laid down, by which the subject is now governed ; it being provided, “that where any real estate (other than or not being a “presentation to a church) shall be devised to any trustee “or executor, such devise shall be construed to pass the fee “simple, or other the whole estate or interest which the “testator had power to dispose of by will, in such real “estate ; unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given “to him expressly, or by implication.” And further (by

(*c*) *Silvey v. Howard*, 6 Ad. & El. 253 ; *Bolton v. Bolton*, Law Rep., 5 Exch. 152.

(*d*) *Denne v. Page*, 11 East,

605, n.

(*e*) *Doe v. Ewart*, 7 Ad. & El. 666 ; *Adams v. Adams*, 6 Q. B.

860.

sect. 31), “that where any real estate shall be devised to a
 “trustee, without any express limitation of the estate to
 “be taken by such trustee; and the beneficial interest
 “in such real estate, or in the surplus rents and profits
 “thereof, shall not be given to any person for life—or
 “such beneficial interest shall be given to any person for
 “life, but the purposes of the trust are to continue beyond
 “the life of such person—such devise shall be construed to
 “vest in such trustee the fee simple, or other the whole
 “legal estate which the testator had power to dispose of
 “by will, in such real estate; and not an estate determin-
 “able when the purposes of the trust shall be satisfied.”

4. If, in the interval between the execution of a will and the death of the testator, one of the objects of his bounty should die, the devise will, by the general rule of law, *lapse*, that is, fail, and take no effect; and this, though the devise should be to the devisee and *his heirs*, or to him and *the heirs of his body*; and the subject-matter of it will be considered as not disposed of by the will. This rule, until the New Wills Act, applied to all cases without distinction; but where an *entailed* estate had been given to one who died and left children, it was attended with peculiar hardship; for if there were a devise to A. and the heirs of his body, and he died before the testator, the gift was void, even though he left issue. So if a testator gave his property among his own children, and one of them died before him, leaving issue, such issue would take nothing under the will, though the probability was, that this consequence could not have been intended. It is true that a testator had it always in his power to make a new disposition in favour of the children of a deceased devisee; but either from negligence or ignorance of the law, or from other accidental causes, this was often omitted; and an alteration of the law itself, as applicable to cases of this description, was therefore thought desirable. The 7 Will. IV. & 1 Vict. c. 26, s. 32, has accordingly provided, “that where any person to whom any real estate

“ shall be devised for an estate tail, or an estate in *quasi*
 “ entail, shall die in the lifetime of the testator, leaving
 “ issue who would be inheritable under such entail, and
 “ any such issue shall be living at the time of the death of
 “ the testator—such devise shall not lapse, but shall take
 “ effect as if the death of such person had happened imme-
 “ diately after the death of the testator, unless a contrary
 “ intention shall appear by the will.” And further (by
 sect. 33), “ that where any person, being a child or other
 “ issue of the testator, to whom any real or personal estate
 “ shall be devised or bequeathed for any estate or interest
 “ not determinable at or before the death of such person,
 “ shall die in the lifetime of the testator, leaving issue,
 “ and any such issue of such person shall be living at the
 “ time of the death of the testator,—such devise or bequest
 “ shall not lapse, but shall take effect as if the death of
 “ such person had happened immediately after the death
 “ of the testator, unless a contrary intention shall appear
 “ by the will ” (*f*). In addition to which enactments, and
 in connection with the subject of lapse, we may notice
 this further provision (sect. 25), introductory of a new rule,
 in cases where a lapse occurs, namely,—“ that unless a con-
 “ trary intention shall appear by the will, such real estate or
 “ interest therein as shall be comprised, or intended to be
 “ comprised, in any devise in such will contained, which
 “ shall fail or be void by reason of the death of the devisee
 “ in the lifetime of the testator, or by reason of such devise
 “ being contrary to law, or otherwise incapable of taking
 “ effect, shall be included in the *residuary devise* (if any)
 “ contained in such will ” (*g*).

5. Under a devise by a testator, having leasehold estate only,—of “ all my lands and tenements,”—a lease for

(*f*) *Johnson v. Johnson*, 3 Ha. 157 ; *Winter v. Winter*, 5 Ha. 306 ; *Eager v. Furnivall*, 17 Ch. D. 115 ; *Stansfeld v. Stansfeld*, 15 Ch. D.

(*g*) *Doe v. Underdown*, Willes, 293 ; *Crawshaw v. Crawshaw*, 14 Ch. D. 817 ; *Hetherington v. Longrigg*, 15 Ch. D. 635.

years has always been allowed to pass, for there would otherwise be nothing for the will to operate upon; but if a testator, using such words, had lands in fee, as well as leaseholds, at the time, the lands in fee only would pass (*h*). It is now, however, provided by 7 Will. IV. & 1 Vict. c. 26, s. 26, “that a devise of the land of
 “the testator, or of the land of the testator in any place,
 “or in the occupation of any person mentioned in his
 “will, or otherwise described in a general manner, and
 “any other general devise which would describe a cus-
 “tomary copyhold or leasehold estate, if the testator had
 “no freehold estate which could be described by it—shall
 “be construed to include the customary copyhold and
 “leasehold estates of the testator or his customary copy-
 “hold and leasehold estates, or any of them, to which such
 “description shall extend, as the case may be, (as well as
 “freehold estates,) unless a contrary intention shall appear
 “by the will” (*i*).

6. In like manner, where a party, having an *estate* in lands (being lands which he is competent to devise), is also entitled, by virtue of a *power* conferred on him for the purpose, to appoint other lands by his last will and testament, it was the rule, prior to the New Wills Act, that a general devise of his lands would operate only on those in which he had the estate, and would not affect those subject to the power; though it was otherwise if he expressly referred to the power, or if it appeared by other circumstances (as by his having no estate for the will to work upon), that he intended the subject of the power to pass (*k*). And such is still the general rule where the power is special, and to be exercised only in favour of particular individuals or classes of persons (*l*); but where the power is general,

(*h*) *Rose v. Bartlett*, Cro. Car. 293.

(*i*) *Prescott v. Barker*, Law Rep., 9 Ch. App. 174.

(*k*) *Denn v. Roake*, 5 Barn. & Cress. 731.

(*l*) *Mills v. Mills*, 34 Ch. Div. 186; *Wood v. Cotton*, 40 Ch. Div. 41.

and enables the testator to appoint to any person that he pleases (which amounts in substance to an ownership), the law is now altered by the New Wills Act; for it is provided by the 7 Will. IV. & 1 Vict. c. 26, s. 27, “that a
 “general devise of the real estate of the testator, or of the
 “real estate of the testator in any place, or in the occupa-
 “tion of any person mentioned in his will, or otherwise
 “described in a general manner,—shall be construed to
 “include any real estate or any real estate to which such
 “description shall extend (as the case may be), which he
 “may have power to appoint in any manner he may
 “think proper; and shall operate as an execution of such
 “power unless a contrary intention shall appear by the
 “will,”—a principle of construction which is expressly made applicable also to personal estate (*m*).

7. By a rule of legal interpretation, at variance with the common apprehension of mankind, and founded upon reasons of a purely technical description, it had long been settled law, that the words *dying without issue* (as where an estate of freehold or leasehold was devised to A., and *upon his dying without issue*, then over to B.), in general imported an *indefinite* failure of issue; that is, a failure not merely at the death of the party whose issue were referred to, but at any subsequent period, however remote (*n*). But by the New Wills Act, such words were directed, for the future, to receive a more natural exposition; it being enacted by 7 Will. IV. & 1 Vict. c. 26, s. 29, “that, in any devise or bequest of real or personal
 “estate, the words ‘die without issue,’ or ‘die without
 “leaving issue,’ or ‘have no issue,’ or any other words
 “which may import either a want or failure of issue of
 “any person in his lifetime or at the time of his death, or
 “an indefinite failure of his issue,—shall be construed to

(*m*) In re Marsh, Mason v. Thorne, 38 Ch. Div. 630; In re Phillips, Robinson v. Burke, 41 Ch. D. 417.

(*n*) Fearne by Butler, pp. 478, 480; Foster v. Hayes, 4 Ell. & Bl. 717; Doe d. Cadogan v. Ewart, 7 Ad. & El. 648.

“ mean a want or failure of issue in the lifetime or at the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being (without any implication arising from such words) a limitation of an estate tail to such person or issue, or otherwise ” (*o*). It is, however, added, that this provision shall not extend “to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.”

IV. [As to the operation of a devise in conveying and limiting real estate :—A will, in regard to its operation on such estate, is considered by the courts not so much in the nature of a testament, as of a *conveyance* declaring the uses to which the land shall be subject (*p*); with this difference, however, that in other conveyances the *subscription* of the witnesses is not, in all cases, essential to the validity of the deed, though it is a prudent precaution (and one which in practice is invariably observed), in order to assist their memory when living, and to supply their evidence when dead; but in a devise, such subscription is made absolutely necessary by statute, in order to identify a conveyance which in its nature can never be set up until after the death of the devisor.]

By a devise, estates may be limited with the same effect as by a conveyance operating under the Statute of Uses (*q*). Thus, a man may effectually devise not only an estate in possession, (that is, in possession immediately on the death of the testator when the will first takes effect,) or in remainder, but also a freehold *in futuro*, or a fee upon a fee

(*o*) Dawson *v.* Small, Law Rep., Burr. 429.

9 Ch. App. 651.

(*q*) 2 Bl. Com. 334; Arthur *v.*

(*p*) Wyndham *v.* Chetwynd, Bokenham, 11 Mod. 154.

(*scilicet*, either defeasibly or alternatively),—all which limitations (as we have seen) may be effectually made by way of executory use, though not in a conveyance at the common law. So a man may devise to his wife—as he may convey to her by way of use—though his conveyance to her at common law was inoperative. His devise moreover in all these cases will be effectual though made by direct gift, and without reference to uses (*r*). Yet as a devise is considered to be in the nature of a conveyance declaring uses, so uses are often expressly introduced into wills; and it has been the practice to introduce them in the same form as in conveyances under 27 Hen. VIII. c. 10. It has been doubted, however, whether that statute has any effect in the case of a devise (*s*): and though where uses are expressly and formally declared by the will, it may often be inferred that the testator had the statute in view, and intended the conversion of the use into legal estate, according to its known mode of operation; yet it is rather by force of his *intention*, than of the statute itself, that the legal estate, in such cases, would be deemed to pass.

A devise by which any future estate is thus limited contrary to the rules of the common law, is called an *executory devise* (*t*); but upon the same principle to which we had before occasion to advert, in the case of a springing or shifting use, it used to be a rule that no limitation, capable of being considered as a remainder, should ever be construed as an executory devise (*u*); although now, as we have seen (*x*), they will in certain cases be construed as executory limitations if they will be supported thereby. And all “executory devises” are also subject, like spring-

(*r*) 2 Bl. Com. 334; Co. Litt. by Butler, 272 a, n. (1).

(*s*) 1 Sand. Uses, p. 196.

(*t*) Fearne by Butl. p. 386; 2 Bl. Com. 172.

(*u*) Fearne by Butl. pp. 386, 394, 525; Doe *d.* Evers *v.* Challis, 20 L. J. (Q. B.) 113.

(*x*) Vide supra, pp. 323, 510.

ing and shifting uses, to the rule against *perpetuity* (*y*). And therefore, until the New Wills Act, it was held that if a chattel (real or personal) were bequeathed to A., and upon his *dying without issue*, then to B., the limitation over to B. was void, as being too remote (*z*); for such words imported (as we have just seen) an *indefinite* failure of issue; but in devises of the freehold, similarly worded, the objection of remoteness did not usually arise; for, in general, the law gave effect, in this case, to the limitation over, by considering the estate of the first taker as amounting, by implication, to an estate *tail*,—a construction which was not admissible in the former case, by reason of there being no estate tail in a chattel (*a*),—and the ulterior estate was regarded as a *remainder*: which, as it might always be barred by the recovery of the tenant in tail, did not fall within the rule against perpetuity.

With respect to the operation of a devise, it remains only to remark, that it vests in the devisee *before and without entry* (subject, however, to his assenting to the devise) an actual freehold by construction of law (*b*); being similar in this respect to a conveyance under the Statute of Uses; but different from a descent, which does not vest in the heir an estate complete for all purposes, unless and until he has made entry on the lands descended. But the devisee may, of course, disclaim (*c*); which, as we have seen, the heir may not do.

(*y*) 2 Bl. Com. 173, 334; Fearne by Butl. 430, 9th ed.; Co. Litt. by Butl. 271 b, n. (1), vii. 2.

(*z*) Fearne by Butl. p. 460; Doe v. Ewart, 7 Ad. & El. 648; Doe v. Duesbury, 8 M. & W. 531.

(*a*) 2 Bl. Com. 398.

(*b*) Co. Litt. 111 a; and see Glass v. Richardson, 2 De G. M. & G. 658; Garland v. Mead, L. R., 6 Q. B. 441.

(*c*) Doe *d.* Winder v. Lawes, 7 Ad. & Ell. 212.

CHAPTER XXI.

OF EXTRAORDINARY CONVEYANCES—OR THOSE BY
MATTER OF RECORD.

HAVING now completed our view of conveyances of the ordinary class, whether founded on the common law or on the statute law, we proceed next to the examination of conveyances which are properly called *conveyances by matter of record*: which, being in use on particular and comparatively rare occasions, may therefore be designated as extraordinary conveyances. These are—1. Private Acts of Parliament; and 2. Royal grants; both of which, as connected but slightly with the main body of the law, will be treated with brevity.

I. Private *Acts of Parliament* have been resorted to as a mode of assurance more frequently in modern than in antient times (*a*). [For it may sometimes happen that, by the ingenuity of some, and the blunders of other practitioners, an estate is most grievously entangled by a multitude of resulting trusts, springing uses, executory devises, and the like artificial contrivances.] Or it may sometimes happen, that, by the strictness of family settlements, or through some omission therein, the tenant of the estate is abridged of some reasonable power, (as making a jointure for his wife, or the like,) which power cannot be

(*a*) 7 Will. 4 & 1 Vict. c. 83; c. 78; 21 & 22 Vict. c. 78; 28 & 29
10 & 11 Vict. c. 69; 12 & 13 Vict. Vict. c. 27; 42 & 43 Vict. c. 17.

given him by the courts even under the liberal provisions of the Settled Estates Act, 1877, or be exercised by him under the still more liberal provisions of the Settled Land Acts. [Or it may be necessary, in settling an estate, to secure it against the claims of infants, or other persons under legal disabilities; who are not, in general, bound by any judgments or decrees of the courts of justice. In these, or other cases of the like kind, the transcendent power of parliament has been ordinarily called in, to cut the Gordian knot; and this practice is said to have been carried to so great a length in the years succeeding the Restoration, that, as a noble historian expresses it (*b*), every man had raised an equity in his own imagination, that he thought was entitled to prevail against any descent, testament, or act of law, and to find relief in parliament; which occasioned the king, at the close of the session, to remark, that the good old rules of law are the best security, and to wish that men might not have too much cause to fear that the settlements which they make of their estates shall be too easily unsettled, when they are dead, by the power of parliament (*c*). But in proper cases, private acts of parliament are of a very advantageous character; and at the present day, acts of this character are carried through, in both houses, with great deliberation and caution; particularly in the House of Lords, where it has been a not infrequent practice to have them referred to two of the judges, to examine and report on the facts alleged, and to settle all technical forms (*d*). Nothing also is done without the consent, expressly given, of all parties in being and capable of consenting, that have the remotest interest in the matter; unless indeed such consent shall appear to be perversely, and without any reason, withheld; and, as was before hinted, an equivalent in money or other estate is usually settled upon infants, or

(*b*) Lord Clar. Contin. 162.
(*c*) Ibid. 163.

(*d*) May's Laws of Parl. pp. 820,
833, 8th ed.

[persons not *in esse*, or not of capacity to act for themselves, who are to be concluded by the Act; and a general saving is constantly added at the close of the bill, of the rights and interests of all persons whatsoever, except those whose consent is so given or purchased, and who are therein particularly named; though it hath been holden, that, even if such saving be omitted, the Act shall bind none but the parties (*e*).

A law thus made, though it binds all parties to the bill, is yet looked upon rather as a private conveyance than as the solemn act of the legislature. It is not therefore allowed to be a *public*, but a mere *private* statute; it is not printed or published among the other laws of the session; and it hath been relieved against, when obtained by fraudulent suggestions (*f*).] Formerly, too, it was subject in every case to this further distinction, that though all public statutes are noticed by the court *ex officio*, no private one was entitled to judicial notice unless specially set forth and pleaded; and such is still the rule as to those passed up to 4th Feb. 1851, inclusive; but by 52 & 53 Vict. c. 63, s. 9, repealing but in substance re-enacting 13 & 14 Vict. c. 21, s. 7, it is provided that every Act passed after the year 1850 shall be judicially taken notice of, unless the contrary be expressly provided and declared by the statute itself (*g*).

II. *Royal grants* are also matter of public record (*h*). [For, as St. Germyn says, the excellency of the sovereign is so high in the law, that no freehold may be given to,

(*e*) 8 Rep. 138 a; Godb. 171; Chapman *v.* Brown, 3 Burr. 1626.

(*f*) M'Kenzie *v.* Stuart, Dom. Proc. 13th March, 1754; Biddulph *v.* Biddulph, 4 Cru. Dig. 549.

(*g*) As to all private Acts, it may be observed that up to 25 Hen. 8 they were enrolled on the rolls of

parliament; but from that date until 32 Geo. 2, the *titles* only usually appear on the rolls. Under the existing practice, however, the titles are not now enrolled, but the Acts themselves are preserved at the Private Bill Office.

(*h*) Vide post, bk. v. c. xv.

[nor derived from, the crown, but by matter of record (*i*). And to this end a variety of offices are erected, communicating in a regular subordination one with another, through which all the royal grants must pass, and be transcribed, and enrolled: that the same may be narrowly inspected by the officers of the crown, who will inform the sovereign if any thing contained therein is improper, or unlawful to be granted. These grants, whether of lands, honours, liberties, franchises, offices, or aught besides, are contained in charters, or *letters-patent*, that is, open letters, *literæ patentēs*; so called because they are not sealed up, but exposed to open view, with the great seal pendant at the bottom; and are usually directed or addressed by the sovereign to all subjects of the realm. And therein they differ from certain other letters of the sovereign, which are also sealed with the great seal, but are directed to particular persons, and for particular purposes; which, therefore, not being proper for public inspection, are closed up, and sealed on the outside, and are thereupon called writs *close*, *literæ clausæ*, and are recorded in the *close rolls*, in the same manner as the others are in the *patent rolls*.]

The course of proceeding formerly observed with respect to the making out of a grant by letters-patent was in general as follows (*k*):—They were, first, to pass by *bill*, prepared by the attorney-general and solicitor-general, in pursuance of a warrant from the crown, and thereafter signed (that is, superscribed at the top) with the sovereign's own *sign manual*, and sealed with the *privy signet*, which was always in the custody of the principal secretary of state; and then sometimes the bill immediately passed under the great seal, in which case the patent was subscribed in these words, "*per ipsam reginam*, by the queen herself" (*l*). Otherwise, the course was to carry an extract of the bill to the keeper of the *privy seal*, who

(*i*) Doct. and Stud. b. 1, d. 8.

(*l*) 2 Rep. 17 b.

(*k*) 2 Bl. Com. 343.

made out a writ or warrant thereupon to the Chancery; so that the sign manual was the warrant to the privy seal, and the privy seal was the warrant to the great seal; and in this last case, the patent was subscribed, "*per breve de privato sigillo*, by writ of privy seal" (*m*). But the practice as to grants by patent was latterly greatly simplified by the statute 14 & 15 Vict. c. 82, which (after repealing a statute of 27 Hen. VIII. c. 11, on the subject) provided, that, in every case where any gift, grant, or writing whatsoever to be passed under the great seal would have before required a bill from the office of the signet or of the privy seal, her Majesty might, by warrant under the royal sign manual, addressed to the lord chancellor, command him to cause letters-patent to be passed under the great seal according to such warrant; and that such warrant should be prepared by the attorney-general or solicitor-general, and should set forth the proposed letters-patent, and should be countersigned by one of the principal secretaries of state, and sealed with the privy seal (*n*). Such was the general course of proceeding as established by that statute: but inasmuch as some letters-patent, writs, commissions, or other instruments, might, before the statute, have been passed under the great seal, by authority of the lord chancellor or otherwise, without passing through the offices of the signet and the privy seal: these were excepted, by an express proviso, from its operation. There are also some royal grants or appointments which only pass through certain offices, as the admiralty, the home office, or treasury, under the authority of a *sign manual* without the confirmation of either the *signet*, the *great* or the *privy* seal; and to these of course the statute had no application (*o*). And now, under the Patents, Designs, and Trade Marks Act, 1883 (*p*), patents for inventions are simply sealed with the seal of the patent office; and by the Great

(*m*) 2 Rep. 17 b; 2 Inst. 555.

(*o*) 25 & 26 Vict. c. 4.

(*n*) By 40 & 41 Vict. c. 41, s. 4,
wafer seals might be used.

(*p*) 46 & 47 Vict. c. 57; 48 & 49
Vict. c. 63.

Seal Act, 1884 (*q*), it has been provided generally, that a warrant under the sign manual, countersigned by the lord chancellor or a secretary of state, or the lord high treasurer, or two of the treasury commissioners, shall be a sufficient authority for passing any instrument under the great seal, and that for the future no instrument need be passed under the privy seal; but where any instrument might before the Act have been passed under the great seal by the fiat of the lord chancellor or otherwise without passing through any other office, it is to continue to be so passed.

[The manner of a grant by the crown (as above set forth), does not more differ from that by a subject, than the *construction* of such grants when made. For, 1. A grant made by the crown, *at the suit of the grantee*, shall be taken most beneficially for the crown, and against the party: whereas the grant of a subject is construed most strongly *against* the grantor. Wherefore it is usual to insert in the royal grants, that they are made, not at the suit of the grantee, but “*ex speciali gratiâ, certâ scientiâ, et mero motu reginæ (aut regis)*”; and then they have a more liberal construction (*r*), as is also the case where they are made upon a valuable consideration (*s*). 2. A subject’s grant is construed to include many things besides what are expressed, if necessary for the operation of the grant (*t*), *e.g.*, a grant of the profits of land, implied the right of ingress, egress, and regress, to cut and carry away those profits (*u*); and so a feoffment, made by a lord to his villein, operated as a manumission (*x*). But the grant of the crown shall not enure to any other intent than that which is precisely expressed in the grant. 3. When it appears, from the face of the grant, that the crown is

(*q*) 47 & 48 Vict. c. 30, repealing the 27 Hen. 8, c. 11; 14 & 15 Vict. c. 82; and the Great Seal Act, 1880 (43 & 44 Vict. c. 10), s. 3.
(*r*) Finch, L. 100; 10 Rep. 112.

(*s*) 6 Rep. 6 a.
(*t*) 1 Saund. by Wms. 323 a, n. (6).
(*u*) Co. Litt. 56 a.
(*x*) Litt. s. 206.

[mistaken or deceived, either in matter of fact, or in matter of law, as in case of false suggestion, misinformation, or misrecital, of former grants; or if the royal title to the thing granted be different from what was supposed; or if the grant be informal; or if an estate be granted contrary to the rules of law;—in any of these cases the grant is absolutely void (*y*). For instance, if the crown grant lands to one and his *heirs male*, this is merely void; for it shall not be an estate tail, because there want words of procreation, to ascertain the body out of which the heirs shall issue; neither is it a fee simple, as in common grants it would be, because it may reasonably be supposed, that the king meant to give no more than an estate tail (*z*); the grantee is therefore (if anything) nothing more than a tenant at will (*a*). And to prevent deceits being practised on the sovereign, with regard to the value of the estate granted, it was particularly provided by the statute 1 Hen. IV. c. 6, that no grant of the crown should be good, unless express mention was made of the real value of the lands in the grantee's petition for them.] As to the mode of proceeding for calling in question the validity of the crown's grant, it is in general by writ or action of *scire facias* at suit of the crown, issued at the instance, or at least with the sanction, of the attorney or solicitor-general (*b*); but as regards letters-patent for inventions, the proceeding by *scire facias* to repeal the patent has been abolished, and in lieu thereof a petition to the Court is now provided, praying for the revocation (*c*).

Lastly, we may observe with respect to the *subject-matter* of royal grants, that—in connection with the provision now usually made by parliament, for the support of the

(*y*) Freem. 172; Gledstanes *v.* Earl of Sandwich, 4 Man. & G. 995.

(*z*) Finch, 101, 102.

(*a*) Bro. Abr. tit. Estates, 33; tit. Patents, 104; Dyer, 270; Dav. 45.

(*b*) 12 & 13 Vict. c. 102, s. 29, &c.

(*c*) 46 & 47 Vict. c. 57, s. 26.

royal dignity—restrictions have been placed by legislative enactment on the alienation of the royal domains (*d*) ; the general effect of which (though subject to a variety of exceptions) is to make such alienations unlawful for any longer period than thirty-one years (*e*). But the private property of the Queen—that is, any estate purchased out of the privy purse, or coming to her Majesty, her heirs or successors, by descent or otherwise, from persons not being kings or queens of the realm—may be disposed of by her as freely as any estate belonging to a private individual (*f*).

(*d*) 1 Anne, c. 1 ; 10 Anne, c. 28 ; 10 Geo. 4, c. 50 ; 1 & 2 Vict. c. 95, s. 4.

(*e*) See also 10 Geo. 4, c. 50, s. 125 (as to making a parliamentary return of all crown grants), and 38 & 39 Vict. c. 87, ss. 65, 66 (as to the registration of all such grants) ; and see generally 15 & 16

Vict. c. 62 ; 29 & 30 Vict. c. 62 ; and 57 & 58 Vict. c. 43, being respectively the Crown Lands Acts, 1852, 1866, and 1894.

(*f*) 39 & 40 Geo. 3, c. 88 (amended by 47 Geo. 3, sess. 2, c. 24) ; 4 Geo. 4, c. 18 ; 25 & 26 Vict. c. 37 ; 36 & 37 Vict. c. 61.

CHAPTER XXII.

OF COPYHOLDS.



Our attention has been hitherto confined to hereditaments of free tenure; but lands may also be held by the base tenure of *copyhold*,—a distinction of tenures of which some general notice has been already taken in a former chapter of this work (*a*); and we are now to examine copyhold lands with reference to the estates therein and the title thereto,—and our exposition of these matters will be found to be in the nature of a mere variation upon that general scheme of real property, which has been already unfolded; and our notice of it shall be directed chiefly to the following points: I. The general nature of copyhold estates; and II. Certain incidents peculiar to those estates, and not applicable to such as are of free tenure. And in what we shall have occasion to say on this subject, we are to be understood as speaking of copyhold commonly so called; the particular varieties of antient demesne, and the rest, not requiring in the present work a more particular notice than has already been bestowed upon them.

I. As to the general nature of these estates, and referring to what we before said of copyhold, we may collect from it, first, that it is in *manors* only that they are to be found; all copyholds being, from their nature, necessarily parcel of some manor. Secondly, that it is by the immemorial custom of the particular manor, that the nature of

(*a*) Vide sup. p. 211.

the copyholder's interest must always be regulated. In some manors, where the custom hath been to permit the heir to succeed to the ancestor, the estates are called copyholds of inheritance; in others, where the lords have been more vigilant to maintain their rights, they remain copyholds for life or years only (*b*); but though the interest of the copyholder may be thus in fee or for life, and consequently may partake of the nature of freehold in respect of the *quantity of estate*, it is nevertheless, for want of the remaining ingredient, (viz. that of free tenure,) no *freehold* (*c*). Indeed, in every case of copyhold, the law still distinguishes between the strictly legal, and the customary, estate; for as regards the former, it supposes the seisin and freehold of the land to be vested in the lord, of whose *demesnes* it is properly parcel; and the copyholder to be mere tenant at will (*d*); but as he is tenant at will *according to the custom*, that is, to hold in fee, or for life, or years, (as the case may be,) it considers him as having a customary estate to that extent; and one that is fixed and permanent in its nature, such as it is out of the power of the lord to defeat or encroach upon (*e*). In consonance with the latter view, which assigns to the copyholder the character of a permanent tenant, he is deemed to owe fealty to his lord; which, as we have seen in a former place, is an obligation from which a mere tenant at will is always exempt (*f*). This complicated kind of interest, according to which the same man shall, with regard to the same land, be at one and the same time tenant in fee simple, and also tenant at the lord's will, seems to have arisen, in the manner formerly explained, from the nature of villeinage tenure (*g*).

(*b*) 2 Bl. Com. 97; Co. Litt. 52 b.

(*c*) Vide sup. p. 186.

(*d*) Dearden v. Evans, 5 Mee. & W. 11; Duke of Portland v. Hill, Law Rep., 2 Eq. Ca. 765.

(*e*) Brown's case, 4 Rep. 21; Co.

Cop. 5, 58; Litt. s. 92, Trespass; Hist. Eng. Law, by Reeves, vol. iii. p. 312; Scriven on Copyholds, 6th ed., by Brown, pp. 12—14.

(*f*) Vide sup. p. 285, n.

(*g*) Vide sup. p. 215.

In the enumeration of the estates of which a copyhold may consist it will be observed, that we have not included estates *tail*: it being only by particular custom that copyholds are capable of being entailed (*h*). For the statute *De donis* has been held not to extend to lands of that tenure: from which it follows that a limitation to a man and “the heirs of his body,” in a copyhold, will ordinarily create not an estate tail, but a fee simple conditional at common law (*i*).

Not only with regard to the quantity of interest, (as being in fee, for life, or for years,) but with regard also to the various modifications to which that interest may be subject, the nature of a copyholder’s estate in general resembles that of an estate held in free tenure (*k*). But as to this, there are some exceptions. Thus,—as to estates in dower and by the curtesy,—it is laid down that copyholds are not, of common right, subject to either of these incidents (*l*): though they may each obtain, and in fact do very frequently obtain (the former under the name of *free-bench*), by the special custom of particular manors (*m*). And to this we may add, that as the mode in which copyholds are conveyed—of which we shall speak hereafter—differs from any of those which are applicable to freeholds; so the limitation of an estate, in the former, is free from some of the restraints imposed, by the ordinary rules of the common law, in the case of the latter. Thus, in a conveyance of a copyhold estate *inter vivos*, though no assistance can be here derived from the Statute of Uses,—yet an estate in fee or for life may be limited *in futuro*; or a fee may be limited upon a fee (*scilicet*, defeasibly or alternatively); or a man may convey to himself, or to his wife (*n*); and a copyhold has been always capable of alienation by will.

(*h*) Co. Litt. 60 b; 2 Bl. Com. 113.

(*l*) 4 Rep. 22 a.

(*i*) Doe *v.* Clark, 5 B. & Ald. 458; vide sup. p. 234.

(*m*) Co. Cop. 110, 111; Gilb. Ten. 161.

(*k*) Co. Cop. 110; Gilb. Ten. 258; 2 B. & Ad. 440.

(*n*) Boddington *v.* Abernethy, 5 B. & C. 782; Co. Cop. 81.

II. Next, as to the incidents of a copyhold estate, in which it differs from one of free tenure; and these regard, first, the estate itself, and, secondly, its title or manner of acquisition.

First. As to the estate itself, a copyholder, even where his interest is in fee, has no right (except in particular manors where it may be warranted by a special custom) to commit *waste*,—for example, to cut down timber unless for reasonable botes or estovers, or to dig for minerals (*o*);—for the law considers him, in these respects, in the light of a tenant at will. And yet this restriction is attended with no corresponding benefit to the lord; for the law does not allow the lord (unless there be a special custom for the purpose) to enter on the land to take the timber or minerals to his own use, without the consent of the copyholder; whose possession, though in strictness a tenancy at will, is nevertheless protected from all invasion (*p*). By such waste, and by many other acts of a wrongful kind,—such as an alienation in fee, or for life, by a common law mode of conveyance proper to freehold, and not applicable to a base tenure—a demise for more than one year, without the lord's licence—a refusal to perform the proper services,—or a disclaimer of his tenancy in open court,—the copyholder forfeits his estate to the lord (*q*).

Moreover the copyholder is ordinarily subject to *quit rents* and *fin*es, and, sometimes, to *heriots*. The nature of a “quit rent” will be noticed in the following chapter, when we shall have occasion to consider the subject of *rents* in general. And as regards “fines,” these are payments due, by the custom of most manors, to the lord, upon every descent or alienation of a copyhold tenement (*r*); and they

(*o*) *Duke of Portland v. Hill*, Law Rep., 2 Eq. Ca. 765.

(*p*) *Whitechurch v. Holworthy*, 4 Mau. & Sel. 340; *Lewis v. Brentwate*, 2 Barn. & Adol. 438; *Phillips v. Hudson*, Law Rep., 2 Ch. App. 243.

(*q*) 1 Watk. Cop. 326; 2 Bl. Com. 284; *Scriven on Copyholds*, 6th ed., by Brown, pp. 178—185.

(*r*) As to fines formerly payable on alienation, &c. by freeholders, vide sup. pp. 177, 198.

accrue by force of the *admittance* to which we are about presently to refer more at large; but are not in general allowed to a larger amount than two years' improved value of the land, after deducting the quit rent. In the case of "tenants in common," this fine is paid apportionably—that is, each pays a separate fine according to his share (*s*); but "joint tenants" and "co-parceners" pay a single fine for all (*t*). And the case of joint tenants is an exception to the general rule as to amount; for, on their admittance, the course is to allow two years' value for the first life, half of that on the second, and half of that last sum on the third; and so according to this descending series, whatever may be the number of tenants (*u*); for as such tenants are entitled to succeed each other by mere survivorship, and without a new admittance, (without which no new fine could be due,) the application of the general rule to this case would operate unfairly on the lord. Occasionally also, double fines are payable, *e.g.*, upon an admittance on a second devolution of the estate when no admittance has been taken on the first devolution (*x*); but as between tenants for life and remaindermen, a single fine only is in general payable, and it is apportioned between them, the admission of the tenant for life enuring also, in general, as the admission of the remaindermen (*y*).

With respect to "heriots," they also are a tribute to the lord of whom a tenement is held; and they are usually divided into two sorts, heriot service, and heriot custom (*z*).

(*s*) *Queen v. Manor of Everdon*, 16 L. J. (Q. B.) 18; *Queen v. Eton College*, 8 Q. B. 526.

(*t*) *Burt. Compend.* 433; *R. v. Manor of Bonsall*, 3 B. & Cress. 175; *Douglas v. Earl of Dysart*, 10 C. B., N. S. 695.

(*u*) *Wilson v. Hoare*, 2 Barn. & Adol. 350; *S. C.* 10 Ad. & El. 236; *Sheppard v. Woodford*, 5 Mee. & W. 608.

(*x*) *Londesborough v. Foster*, 3 B. & S. 805; *Paterson v. Paterson*, Law Rep., 2 Eq. Ca. 31; *Naylor and Spendla's Contract*, 34 Ch. D. 217; *Hall v. Bromley*, 35 Ch. Div. 642.

(*y*) *Dean of Ely v. Caldecot*, 8 Bing. 439; *Phypers v. Eburn*, 3 Bing. N. C. 250; *Garland v. Aston*, 3 H. & N. 390.

(*z*) 2 Bl. Com. 422.

The former are such as are due upon a special reservation in a grant or lease of lands; but they do not usually occur, except where they form part of the services by which some *particular* tenement within the manor has been held from time immemorial, and which may therefore be supposed to have been reserved by the grant of it originally made. Heriots of the kind called heriot custom, on the other hand, arise upon no special reservation whatsoever, but depend merely upon custom; being founded on a *general* usage within some manor, from time immemorial: as that every tenement within the manor has always paid, under certain circumstances, a heriot to the lord (*a*). A heriot may be due either from the free (*b*) or from the copyhold tenants of a manor (*c*); and it may accrue either in respect of the death or alienation of the tenant; but it is claimed more ordinarily in respect of the death (*d*). [It is sometimes the best live beast, *averium*, of which the tenant dies possessed (*e*), sometimes the best inanimate good, under which a jewel or piece of plate may be included; but it is always a personal chattel, which immediately upon the death of the tenant who was the owner of it, being ascertained by the option of the lord, becomes vested in the lord as his property; and is no charge upon the lands, but merely on the goods and chattels. The tenant must be the owner of it, else it cannot be due; and therefore on the death of a *feme covert*, no heriot can (or originally could)

(*a*) Heriots are of great antiquity, being mentioned in England as early as the time of Edgar. (See Hallam's *Mid. Ages*, vol. ii. p. 416; and Selden's *Works*, vol. ii. p. 1620.) Blackstone (vol. ii. p. 423) observes, that we find in the laws of Canute, c. 69, the several *heregeates* specified; and that these consisted for the most part in habiliments of war, which the word itself, according to Spelman, signifies; but the

heriot of the villein, unlike that of the military tenant, was generally some beast used for the purposes of agriculture.

(*b*) *Damerell v. Protheroe*, 10 Q. B. 20; *Lord Zouche v. Dalbiac*, Law Rep., 10 Exch. 172; *Scriven on Copyholds*, 6th ed. by Brown, p. 228.

(*c*) Bl. Com. ubi sup.

(*d*) 2 Watk. Cop. 135, 145.

(*e*) Bract. l. ii. c. 36, s. 9.

[be taken : for she can (or originally could) have no ownership in things personal (*f*). In some places there is a customary composition in money,—as ten or twenty shillings,—in lieu of a heriot; by which the lord and tenant are both bound, if it be an indisputably antient custom; but a new composition of this sort will not bind the representatives of either party (*g*).] And it is further to be remarked, that if the tenement should happen to be at any time divided into distinct shares, either by becoming vested in tenants in common, or by alienation of parcel in severalty, the heriot is *multiplied* accordingly (*h*); though upon the subsequent reunion of the parts in a single owner, the multiplication (at least in the case of a tenancy in common) ceases (*i*). But on the alienation of joint tenants,—in the case of a manor in which a heriot is payable on alienation,—a single heriot only is due (*k*).

A copyhold estate, while subject to particular burthens, enjoyed on the other hand, until a comparatively recent period, some exceptional immunities. For it was not assets in the hands of the heir or devisee; and was consequently exempt, after the tenant's death, from the claims of his creditors (*l*); nor could any part of it be taken in execution, even during his life, upon an *elegit* (*m*). But these anomalies are now substantially rectified; for by 3 & 4 Will. IV. c. 104, a man's copyhold or customary-hold estate (not charged with or devised subject to the payment of his debts) was made, equally with his freehold, *assets in equity*; and by 1 & 2 Vict. c. 110, s. 11, it was made equally liable with freehold hereditaments to be seized in execution under an *elegit*.

In order to complete our general view of the copyhold

(*f*) Hob. 60.

Garland *v.* Jekyll, 2 Bing. 273.

(*g*) Co. Cop. s. 31; Parkin *v.* Radcliffe, 1 Bos. & Pul. 282; Croome *v.* Guise, 4 Bing. N. C. 148.

(*k*) Padwick *v.* Tyndale, 1 E. & E. 184.

(*h*) 2 Watk. Cop. 149, 159;

(*l*) 4 Rep. 22 a; 1 Watk. Cop. 224.

Garland *v.* Jekyll, 2 Bing. 273.

(*m*) 2 Eq. Ca. Ab. 226, pl. 6; 1

(*i*) Attree *v.* Scutt, 6 East, 476;

Watk. Cop. 224.

estate, we must also recollect that it is capable of *enfranchisement*, or conversion of the base tenure into free; and that, either by a conveyance by the lord to the tenant of the freehold estate in the copyhold premises, or by a release of the seignorial estate and rights (*n*); the effect in either case being, that the tenant thereafter no longer holds by base, but by free tenure (*o*): from which this consequence also follows, that the tenement is discharged from all copyhold burthens to which it was before subject (*p*); and this further consequence was commonly reputed to follow, namely, that the enfranchised tenant thereafter held, not of his old lord, but of the lord above; but for the future, in the case at least of enfranchisements effected under the Copyhold Act, 1887 (*q*), s. 4, or now under the Copyhold Act, 1894 (*r*), s. 21, he now holds, although by free tenure, of the same old lord. And by the last-mentioned act,—which repeats the like provision contained in the earlier Copyhold Acts, and which were also contained in the Copyhold Act, 1887,—freehold lands which are subject to heriots may also be enfranchised therefrom.

Secondly. The incidents of copyhold, with regard to its title or manner of acquisition, are in some respects the same with those of freehold; and particularly as regards the mode of descent: though this is much varied by the special customs of particular manors. There are, however, many incidents of a peculiar kind; and these, in general, result from the fundamental idea before remarked upon, that the interest of the copyholder is in strictness no more than a tenancy at will. Considered as such, it would be wholly incapable of direct alienation, for that would be a determination of the will; and therefore to this day, the attempt to transfer a copyhold, either for an

(*n*) 1 Watk. Cop. 362.

(*o*) Ibid. 367.

(*p*) 1 Watk. Cop. 368.

(*q*) 50 & 51 Vict. c. 73; Brown's Copyhold Enfranchisement Acts.

(*r*) 57 & 58 Vict. c. 46.

estate of inheritance or for life, by any of those direct methods which are applicable to a freehold estate, is (as already remarked) in general attended with no other effect but to occasion a forfeiture to the lord. Yet, by the lord's *licence*, the copyholder may (by a common law deed) demise for a term of years (*s*) ; and, even without his licence, for a single year ; and custom and the indulgence of the law, which favours liberty, also allow him to exercise a substantial, though indirect, right of alienation to any extent whatever, whether in fee, for life, or for years, under colour of a *surrender* of his interest to the lord, and an *admittance* or grant by the latter, *de novo*, to the tenant's nominee ; such admittance being attended with those ceremonies of investiture, which marked in former days the original donation of a fief. And under the express provision of particular statutes, he may (even by a common law deed) convey the whole fee simple estate (so called) in the copyhold tenement,—*e. g.*, by deed poll under the Lands Clauses Act, 1845 (*t*), and by an ordinary indenture under the Settled Land Act, 1882 (*u*) ; but save as so enabled by statute, he cannot (by any common law mode of assurance, other than by his will) convey the copyhold estate (*x*) ; but he must for that purpose proceed by surrender and admittance.

The nature of a surrender and admittance is, in a general point of view, and according to the custom of most manors, as follows : [the tenant comes to the steward of the manor, either in court (*y*), or, if the custom permits, out of court, or else to two customary tenants of the same manor, or to a single tenant provided there be also a custom to warrant it (*z*),—and then by delivering up a rod, a glove, or other symbol, as the custom directs,

(*s*) 1 Watk. Cop. 302 ; Scriven on Copyholds, 6th ed., by Brown, pp. 178, 193.

(*t*) 8 & 9 Vict. c. 18, s. 95.

(*u*) 45 & 46 Vict. c. 38, s. 20.

(*x*) 2 Watk. Cop. 119 ; *Dimes v. Grand Junction Canal*, 9 Q. B. 669 ; 3 H. L. Ca. 794.

(*y*) Vide sup. p. 212.

(*z*) 1 Watk. Cop. 78.

[resigns into the hands of the lord, by the hands and acceptance of his steward, or of the two tenants, or tenant, all his interest in and title to the estate; in order that the same may be again granted out by the lord to such persons and for such uses as are named in the surrender, and as the custom of the manor will warrant; but which uses, we need hardly observe, are not uses within the meaning of (or executed by) the Statute of Uses (*a*). And accordingly, and upon such surrender, the lord, by his steward, grants the same land again to the surrenderor's nominee, who is usually, though rather improperly, called the surrenderee, to hold by the antient rents and customary services; and thereupon admits him tenant to the copyhold according to the form and effect of the surrender, which must be exactly pursued; and this is done by delivering up to the same tenant the rod, or glove, or the like, in the name and as the symbol of corporeal seisin of the lands and tenements; upon which admission he pays a fine to the lord, according to the custom of the manor (*b*).] And the steward is, by the Stamp Act, 1891 (*c*), ss. 65—68, under a duty to see that the surrender or admittance (or the copy thereof which he delivers out) is duly stamped, and may (before he accepts the surrender or grants the admittance) require payment of the amount of such stamp and of his lawful fees.

In order the more clearly to apprehend the nature of this peculiar assurance, let us take a separate view of its several parts, the surrender and the admittance: considered with reference, not to their form (for of that enough has been said) but with reference to the doctrines and principles to which they are respectively subject.

1. [A “surrender” is rather a manifestation of the alienor’s intention, than a transfer of any interest in possession; for until admittance of the surrenderee, the lord

(*a*) 1 Watk. Cop. 100, 212;
Rowden v. Maltster, Cro. Car. 42;
Rigden v. Vallier, 2 Ves. 257.

(*b*) 2 Bl. Com. p. 365.
(*c*) 54 & 55 Vict. c. 39; Cole v.
Jackson, 5 Hare, 51.

[taketh notice of the surrenderor, as his tenant; and the surrenderor still receives the profits of the land to his own use, and shall discharge all services due to the lord; and the lord cannot take notice of the surrenderee for any purpose (*d*),—not even although he should have personally accepted the surrender (*e*). Yet the interest remains in the surrenderor not absolutely, but *sub modo*; for he cannot pass away the land to any other, or make it subject to any other incumbrance than it was subject to at the time of the surrender;] and he is considered as a trustee for the surrenderee, who has an equitable interest capable of being devised or otherwise assigned (*f*). The latter also has a right to call upon the lord to admit him, and in the event of his refusal may compel him to do so by mandamus or other appropriate proceeding in the High Court of Justice (*g*). But no estate whatever is vested in the surrenderee as *copyhold tenant*, before admittance. [If he enters without, he is, strictly speaking, a trespasser, unless the surrender should operate as a licence to excuse the trespass; and if, on such entry, he surrenders to the use of another, such surrender is merely void, and by no matter *ex post facto* can be confirmed as if by relation (*h*). For though he be admitted in pursuance of the original surrender, and thereby acquire afterwards a sufficient and plenary interest as absolute owner, yet his surrender to another previous to his own admittance is absolutely void *ab initio*; because, at the time of such surrender, he had but a possibility of an interest, and could therefore transfer nothing by the purported surrender; and no subsequent admittance can make an act good which was *ab initio* void. But an unadmitted devisee may now (under the

(*d*) Lord Wellesley *v.* Withers,
4 Ell. & Bl. 750.

(*e*) Doe *v.* Tofield, 11 East, 246.

(*f*) 1 Watk. Cop. 102.

(*g*) 2 Bl. Com. 369; Scriven on

Copyholds, 6th ed., by Brown,
p. 366; Queen *v.* Lord Wellesley,
2 Ell. & Bl. 924.

(*h*) Doe *v.* Tofield, 11 East, 246,

251.

[7 Will. IV. & 1 Vict. c. 26, ss. 3, 4) make an effectual devise, his devisee paying a double fine, together with double fees and double stamps.

2. "Admittance" is the last stage or perfection of the copyhold assurance; and considered in that light, it may either be an admittance upon surrender (or devise) by the former tenant, or an admittance upon a descent from the ancestor. In both these the lord is used as a mere instrument: and as no manner of interest passes into him by the surrender (or devise) or by death of his tenant, so no interest passes out of him by the act of admittance; and the claim of the tenant who is admitted is solely under him that made the surrender, or under the ancestor (*i*). And, therefore, neither in the one case nor in the other is any respect had to the quality or quantity of the lord's estate in the manor. For it is immaterial whether he be tenant in fee or for years, or whether he be in possession by right or by wrong; since the admittances made by him shall not be impeached on account of his title, because they are judicial, or rather ministerial acts, which every lord in possession is bound to perform (*k*).

Admittances, however, upon surrender differ from admittances upon descent, in this, that, by surrender, nothing beyond the mere possibility of an interest is vested in the surrenderee, before admittance; but, upon descent, the heir is tenant by copy immediately upon the death of his ancestor: not indeed to all intents and purposes, for he cannot be sworn on the *homage*, that is, as one of the tenants present at the lord's court; nor maintain an action in the lord's court, as tenant; but to most intents the law taketh notice of him as a perfect tenant of the land, instantly upon the death of his ancestor. He may, for example, enter into the lands before admittance; may take the profits; may punish any trespass done upon the

(*i*) 2 Bl. Com. 370; 4 Rep. 27; (*k*) 4 Rep. 27; 1 Rep. 140.

Co. Litt. 59.

[ground (*l*); may devise the land descended on him (*m*); nay, upon satisfying the lord for his *fine* due upon the descent, may surrender into the hands of the lord to whatever use he pleases. For which reasons we may conclude, that the admittance of an heir is principally for the benefit of the lord, to entitle him to his *fine*; and not so much necessary for the strengthening and completing of the heir's title. Hence, indeed, an observation might arise, that, if the benefit which the heir is to receive by the admittance is not equal to the charge of the *fine*, he will never come in and be admitted to his copyhold in court; and so the lord may be deprived of his *fine*. But to this we may reply in the words of Sir E. Coke (*n*)—"I assure myself, if it were "in the election of the heir to be admitted, or not to be "admitted, he would be best contented without admittance; "but the custom in every manor is in this point compulsory. For either upon pain of forfeiture of the copyhold, "or of incurring some great penalty, the heirs of copyholders are enforced in every manor to come into court "and be admitted according to the custom, within a short "time after notice given of their ancestor's decease."]

Accordingly (by the custom of most manors), if no person come in to be admitted in the place of a deceased tenant, the lord of the manor, after making due proclamation at three consecutive customary courts, may seize the land into his own hands *quousque*, that is, until some person claims to be admitted (*o*). And by reason of the difficulty sometimes experienced by lords in procuring tenants to be admitted, *e.g.*, when they are infants or married women, it has been provided by 11 Geo. IV. & 1 Will. IV. c. 65, that the lord may (on their failure to come in and be admitted) himself appoint an attorney for them to take

(*l*) 4 Rep. 23.(*n*) Co. Cop. s. 41.

(*m*) Right *v.* Banks, 3 Barn. & Adol. 644; Doe *v.* Wilson, 5 Ad. & El. 321; 7 Will. 4 & 1 Vict. c. 26, s. 3.

(*o*) 1 Watk. Cop. 290; Scriven on Copyholds, 6th ed., by Brown, pp. 114—117.

admittance and admit them by such attorney accordingly, and proceed thereupon to recover his fine; and the like provisions are applicable also to the case of lunatic copyholders (*l*).

But though, in the case of an admittance upon surrender, no copyhold estate is vested in the surrenderee until he is admitted, and it is distinguishable in this respect from an admittance upon descent; yet it is material to observe, that even an admittance upon surrender, when made, has a retrospective relation, in point of time, to the surrender itself. And therefore if the surrenderor dies after the surrender, and before admittance, though his heir will take by descent in the interim, yet on the admittance of the surrenderee, the heir's estate will be defeated (*m*). And in conclusion, we should observe that it is only the legal estate that is considered upon a surrender and admittance (*n*); and the steward may reject any surrender which purports to disclose any trust (*o*).

Such is, in general, the nature of a surrender and admittance, in the simplest form; and the only variations upon the proceeding, which it is material at present to notice, relate to a conveyance by way of mortgage. Here the surrender is made upon *condition* that the money remains unpaid at the time appointed; but in the meantime no admittance takes place; and if the money be then paid, the surrender not having been perfected by admittance, is void without further ceremony; nor is it the usual course to complete the copyhold estate by admittance, even supposing the money to remain unpaid, unless the mortgagee wishes to take possession; but the conditional surrender constitutes the only security, and continues to do so until the mortgage is satisfied, and entry of such

(*l*) 53 Vict. c. 5, ss. 125, 126, repealing, but re-enacting, 16 & 17 Vict. c. 70.

(*m*) 1 Watk. Cop. 103; Doe v. Hall, 16 East, 208.

(*n*) Hall v. Bromley, 35 Ch. D. 642.

(*o*) Flack v. Downing College, 13 C. B. 945.

satisfaction is made on the court rolls; after which the original title of the mortgagor is considered as remaining in full force (*p*).

The admittances of which we have hitherto spoken are those used to complete an inchoate title by surrender or descent. It is to be observed, however, that there is another kind of admittance, viz., that which is connected with an original voluntary grant from the lord himself, and not with any preceding surrender or devise or descent (*q*). This occurs chiefly in the case where the lord has himself acquired the copyhold interest, in consequence of some escheat, forfeiture, descent, surrender to his own use, or other circumstance, so that the freehold and copyhold interest are united in his person (*r*); which produces an *extinguishment* of the copyhold (*s*). In such cases the lord may, if he thinks proper, notwithstanding the extinguishment of the former copyhold estate, grant the lands out *de novo* to hold by copy (*t*); but if he does this he is bound to observe the antient custom precisely in every point, and can neither in tenure nor estate introduce any kind of alteration; for that were to create a new copyhold, which, as this tenure depends on immemorial custom, cannot be done. Thus, if a copyhold for life falls into the lord's hands and he grants it out again by copy, he can neither add to nor diminish the antient rent, nor make any the minutest variation in other respects (*u*); nor can he charge or encumber, in any way, the tenant's estate so granted (*x*).

The lord may also, where there is a special custom in the manor to that effect, make grants of portions of the *waste*, to be held for the first time by copy of court roll; but a custom to grant out every part of the waste without restriction, would be illegal, as trenching too much upon

(*p*) 1 Watk. Cop. 116, 117.

(*q*) 2 Bl. Com. 370.

(*r*) 1 Watk. Cop. 36, 39.

(*s*) Ibid. 359, 361, 423.

(*t*) 1 Watk. Cop. 93, 361.

(*u*) Co. Cop. s. 41.

(*x*) 8 Rep. 63.

the general common right of the tenants (*y*) ; and to the validity of the grant of any portion, the assent of the *homage* is, by the custom of some manors, essential ; also, such grants cannot any longer be made in any case, unless with the consent of the Board of Agriculture, Land Commissioners' Department ; and all such grants so made are now in the nature of freeholds and not of copyholds (*z*).

Again, admittance may also take place in the case of a devise ; for a copyhold estate is now as devisable by will as a freehold. Formerly copyholds were not directly devisable even when lands of freehold tenure had become so by virtue of the statutes of Henry VIII. before mentioned. But when a man wished to devise a copyhold, the object was effected by the devisor, in his lifetime, making a surrender *to the use of his will* ; which, upon his death, entitled the person, designated in such will as devisee, to be admitted (*a*) ; and, except by special custom, a devise without a previous surrender of this kind was inoperative (*b*). However, by 55 Geo. III. c. 192 (passed 12th July, 1815, and commonly called Preston's Act), every disposition made by will, by a person dying after the passing of that Act, was made as effectual *without* a surrender to the use of his will, as it would have been if such a surrender had taken place (*c*). And so by the New Wills Act (repealing 55 Geo. III. c. 192, except as to wills made before 1st January, 1838), it is provided that all the *real estate* of the testator may be devised ; and under that description, all his copyholds, though he should not have surrendered them to the use of his will, nor have

(*y*) 1 Watk. Cop. 35 ; Lord Northwick *v.* Stanway, 3 Bos. & Pul. 346 ; The King *v.* Wilby, 2 M. & S. 509 ; Badger *v.* Ford, 3 B. & Ald. 153.

(*z*) 57 & 58 Vict. c. 46, s. 81, repeating the like provision contained in the 50 & 51 Vict. c. 73, s. 6 ;

and see Brown's Copyhold Enfranchisement Acts, pp. 267, 268.

(*a*) Co. Cop. s. 36.

(*b*) 1 Watk. Cop. 122 ; Cuthbert *v.* Lempriere, 3 M. & S. 158.

(*c*) Glasse *v.* Richardson, 2 De G., M'N. & G. 659 ; Traherne *v.* Gardner, 5 Ell. & Bl. 913.

even been admitted to them himself, are expressly included (*d*).

Copyhold lands may, moreover, pass by a conveyance under the Act for abolishing Fines and Recoveries, 3 & 4 Will. IV. c. 74. In some manors an estate limited to a man “and the heirs of his body,” might (prior to that statute) have been barred by a customary recovery, founded on a fictitious action in the lord’s court, according to the analogy of a common recovery in the Court of Common Pleas (*e*) ; in others, such customary estate tail was capable of being barred by surrender (*f*) ; but no such recovery could properly have been suffered (of copyhold lands) in the Court of Common Pleas itself, although (in the case of antient demesne lands) recoveries were sometimes wrongfully suffered in that Court, obliging the lord of the manor to take proceedings for their reversal, failing which proceedings, the copyholds (it was said) became of freehold tenure ; but all such recoveries are now expressly forbidden (*g*). And now generally by the 3 & 4 Will. IV. c. 74, it has been enacted, that a disposition by tenant in tail of the legal estate in a copyhold, shall in every case be by surrender (*h*) ; subject to provisions as to the consent of the protector of the settlement (where there is one), analogous to those which the statute introduced in relation to the disentailing of freehold lands (*i*) : but it is provided that such surrender (differing in this respect from a disentailing deed of freeholds) shall require no enrolment, otherwise than by entry on the court rolls (*k*). It is also enacted by the same Act, with respect to the copyhold of a *married woman* when not tenant in tail—for when she is so, her estate is to pass by surrender as before the statute, *i.e.* by

(*d*) 7 Will. 4 & 1 Vict. c. 26, s. 3 ;
Garland *v.* Mead, Law Rep., 6 Q.
B. 441.

(*e*) Doe *v.* Dauncey, 7 Taunt.
674 ; 1 Watk. Cop. 161.

(*f*) Doe *v.* Dauncey, 7 Taunt.
678 ; 1 Watk. Cop. 178.

(*g*) 3 & 4 Will. 4, c. 74, s. 5 ;
2 Bl. Com. 368 ; Scriven on Copy-
holds, 6th ed., by Brown, pp. 35—
37.

(*h*) 3 & 4 Will. 4, c. 74, s. 50.

(*i*) Sects. 40, 51, 52, 90.

(*k*) 3 & 4 Will. 4, c. 74, s. 54.

the surrender of herself and husband, she being at the same time examined apart by the steward (*l*)—that she may by deed, acknowledged in such manner as therein directed, and executed with the concurrence of her husband, convey her estate, or extinguish any interest or power vested in her, as effectually as if she were a *feme sole*; though this enactment is expressly declared not to extend to her legal estate in any case in which the object of that provision could, before the passing of the Act, have been effected by a surrender (*m*).

The preceding remarks relate, it will be observed, to the manner of conveying the *legal* estate in copyhold lands. With respect to *equitable* interests in lands of this tenure, they do not in general pass by surrender, for none but the owner of the legal estate is tenant to the lord, nor consequently entitled to surrender (*n*); but by any ordinary mode of conveyance sufficient to pass an equitable interest in other cases: and a mere instrument in writing, signed as directed by the Statute of Frauds, will suffice (*o*). But as to equitable *estates tail*, and the equitable estates of *married women not tenants in tail*, it is provided by the Fines and Recoveries Act, that they shall pass either by surrender or by a disentailing or other deed, attended with the same formalities in general which are prescribed by that statute with reference to a transaction affecting legal estates (*p*).

It now remains for us to consider the provisions of the Copyhold Act, 1894 (57 & 58 Vict. c. 46), which has consolidated all the provisions of the Copyhold Acts, 1845 to 1887, being the statutes 4 & 5 Vict. c. 35, 6 & 7 Vict. c. 23, 7 & 8 Vict. c. 55, 15 & 16 Vict. c. 51, 21 & 22 Vict. c. 94, 23 & 24 Vict. c. 59, 31 & 32 Vict. c. 89, and 50 & 51 Vict. c. 73; and which provisions had and have in view three principal objects, that is to say, firstly, to enable

(*l*) 1 Watk. Cop. 63; *Driver v.*

Thompson, 4 Taunt. 294.

(*m*) 3 & 4 Will. 4, c. 74, s. 77.

(*n*) 1 Watk. Cop. 60.

(*o*) 1 Watk. Cop. 60.

(*p*) 3 & 4 Will. 4, c. 74, ss. 50,

53, 77, 90.

lords and tenants to effect, by agreements subject to the Acts, the commutation of the manorial burdens and other restrictions incident to the copyhold as such ; secondly, to improve in certain particulars the law of copyholds generally ; and thirdly, and chiefly, to enable the parties or either of them to procure the conversion of the copyhold into freehold tenure, or, in other words, to procure an enfranchisement of the copyhold hereditament.

In promotion of these views the statutes established a Board of “Copyhold Commissioners” (*q*), now merged in the Board of Agriculture (*r*) ; and they enacted, Firstly, with regard to *commutations*,—that by way of a general scheme for the whole manor, the future rents, fines, and heriots, and the lord’s right in timber, and also (if so expressed) in mines and minerals, might in all cases be *commuted* by agreement, the parties to such agreement being respectively interested to the extent of three-fourths at least in value, and the number of the tenants parties to the agreement being, at least three-fourths of the whole, and all ecclesiastical and other corporations and patrons of livings being made parties to the agreement, and the commutation being afterwards confirmed by the Commissioners (*s*). And although such general commutations latterly ceased to be made, still particular commutations between the lord of the manor and any one or more of his tenants, might still have been made and in fact continued to be made, and (after confirmation by the commissioners) were binding on the parties and on all other persons connected with them in title,—notice being given to the persons next entitled in remainder, reversion or expectancy, who were permitted to urge before the commissioners any objection to the proposed arrangement (*t*). And after a commutation duly effected, the lands, although still remaining copyhold for most purposes, ceased to be subject to

(*q*) 4 & 5 Vict. c. 35, s. 2.

(*s*) 4 & 5 Vict. c. 35, ss. 13, 22,

(*r*) 52 & 53 Vict. c. 30 ; 57 & 58

23.

Vict. c. 46, ss. 90—93.

(*t*) 4 & 5 Vict. c. 35, s. 52.

any customary mode of descent ; or to any custom relating to dower, freebench, or tenancy by the curtesy, except as to persons married before the commutation took place : and became liable, as regards all those matters, to the same law as lands held in free and common socage (*u*). But even these particular commutations have now ceased to be made, and the Copyhold Act, 1894, contains no provision regarding them ; and as regards the general commutations above referred to (and which have sometimes been called commutations by apportionment), the Act (by sect. 100) merely recognizes the continuing validity of all past commutations, and (by sect. 63) provides for their being put in evidence, and renders recitals and the like contained therein sufficient evidence of the facts recited and the like.

Secondly, certain improvements in the copyhold tenure were introduced by the earlier Copyhold Acts, chiefly by the Copyhold Act, 1841, and these improvements have been continued by the Copyhold Act, 1894. Thus, to remove doubts before existing on the subject, it is provided, that it shall be lawful for the courts to make partition of copyhold lands, as well as of lands of freehold tenure (*x*) ; and to do so, by the like order as in the case of freehold lands (*y*). And to obviate certain inconveniences previously attaching to the practice of surrenders, admittances and grants, it is enacted, that lords of manors (or their stewards or deputy stewards,) may hold customary courts, though there should be no copyhold tenant at the time, or none should be present ; and may grant lands to be held by copy, and also admit to lands to be held by copy, at any time or place (whether within or without the manor), and without holding a court (*z*). And whereas, before these statutes, it was in many cases necessary that a surrender, or other act *out* of court, should be afterwards *presented* in court by the homage, or tenants

(*u*) 4 & 5 Vict. c. 35, s. 79.

(*x*) Sect. 75.

(*y*) 57 & 58 Vict. c. 46, s. 87.

(*z*) 57 & 58 Vict. c. 46, ss. 82, 83, 84, re-enacting 4 & 5 Vict. c. 35, ss. 86, 87, 88, 89.

of the manor there assembled (*a*),—it is provided that every copy of a surrender, will or codicil delivered to the lord, steward, or deputy, and every grant and admission, shall be forthwith entered on the court rolls of the manor; and that such entry shall be taken to be an entry in pursuance of a presentment: and that it shall not be essential in any case to the validity of an admission, that a presentment should be made of the surrender, or other matter in consequence of which the admission was granted (*b*). It is provided, however, that when, by the custom of any manor, the lord is authorized, by consent of the homage, to grant parcel of the waste to be held by copy, the consent of the homage assembled at a customary court, duly summoned and held according to the custom, shall still be necessary (*c*). And whereas by the custom of some manors, a licence from the lord to aliene is required, and in some of these cases lords were restrained, by the custom, from granting licences to their tenants to aliene their antient tenements, otherwise than by *entireties* (*d*),—it is enacted that licences to aliene parcels may now be granted, and such alienation may be made accordingly (*e*).

Thirdly, with a view to facilitating *enfranchisement*, that is to say, the conversion of copyhold into freehold, the Copyhold Act, 1894, re-enacting the like provisions contained in the earlier Copyhold Acts, provides, in substance (for no minute detail can be attempted in this place), that, with the consent of the commissioners (or now of the Board), it shall be lawful for the lord, whatever may be his interest, to enfranchise all or any of the lands holden of his manor; and that it shall be lawful for any tenant (whatever his interest), with the like consent, to accept such enfranchisement,—enfranchisements so effected being

(*a*) 1 Watk. Cop. 79, 80.

89, 90.

(*b*) 57 & 58 Vict. c. 46, s. 85, re-enacting 4 & 5 Vict. c. 35, s. 90.

(*d*) 1 Watk. Cop. 287 n. (*x*).

(*c*) 57 & 58 Vict. c. 46, ss. 82, 83, re-enacting 4 & 5 Vict. c. 35, ss.

(*e*) 57 & 58 Vict. c. 46, s. 86, re-enacting 4 & 5 Vict. c. 35, s. 92.

called voluntary enfranchisements (*f*). And the Act further provides, that independently of any mutual agreement upon the subject, it shall be lawful for any copyhold tenant—other than one who holds only for life or lives or years, without right of renewal—or for any lord, to *require* and *compel* enfranchisement,—enfranchisements so effected being called compulsory enfranchisements (*g*); and in the case of these latter enfranchisements, the amount, nature and particulars of the compensation for the manorial rights is ascertained (unless the parties can agree) under the direction of the Copyhold Commissioners (or now of the Board) (*h*). And as regards the expenses of and attending the enfranchisement, the Act provides, that the expense of a compulsory enfranchisement shall be borne by that party (whether the lord or the tenant) who shall have required the same (*i*); which expenses may (in the case of limited owners) be charged (in the case of tenants) on the lands enfranchised, and (in the case of lords) on the manor (*k*); and further, that upon every enfranchisement (whether compulsory or voluntary) being effected, the land shall become in all respects of freehold tenure, and cease to be subject to any particular custom whatever (*l*); but that, on the other hand, no compulsory enfranchisement shall compulsorily affect any right as to mines or minerals, or any right of fair or market, or of game, fish, or fowl (*m*); or, since the 16th of September, 1887, the lord's right of escheat (*n*). And these provisions of the Copyhold Act, 1894, extend also to extinguishing, in the case of freehold lands held of the manor, the heriots or other like incidents of tenure annexed thereto (*o*).

(*f*) 57 & 58 Vict. c. 46, ss. 14—20.

(*g*) *Ibid.*, ss. 1—13.

(*h*) *Ibid.*, ss. 5—7; *Lingwood v. Gyde*, Law Rep., 2 C. P. 72.

(*i*) 57 & 58 Vict. c. 46, s. 34.

(*k*) *Ibid.*, ss. 36, 37.

(*l*) *Ibid.*, s. 21; *Brabant v. Wilson*, Law Rep., 1 Q. B. 44; *Scriven on*

Copyholds, 6th ed., by Brown, pp. 284—298; Brown's Copyhold Enfranchisement Acts.

(*m*) 57 & 58 Vict. c. 46, s. 23, re-enacting 15 & 16 Vict. c. 51, s. 48.

(*n*) 57 & 58 Vict. c. 46, s. 21, re-enacting 50 & 51 Vict. c. 73, s. 4.

(*o*) 57 & 58 Vict. c. 46, ss. 2, 94.

CHAPTER XXIII.

OF INCORPOREAL HEREDITAMENTS, CALLED ALSO "PURELY
INCORPOREAL" HEREDITAMENTS.

INCORPOREAL hereditaments now remain to be considered ; and in order to distinguish them from remainders and reversions and other such estates (which are also in a sense incorporeal hereditaments), the hereditaments we are now about to consider have sometimes been called purely incorporeal hereditaments. And in the widest sense of the word, an incorporeal hereditament is, first of all, not the object of the bodily senses,—a thing incapable of being touched,—whence it is called *incorporeal* ; and secondly, it is a *hereditament*, that is to say, something descendible to heirs (as distinguished from executors or administrators) ; and it may be (but rarely is) personal property, *e. g.*, in the case of a personal annuity descendible to heirs (*a*) ; most usually, —and, in fact, in almost all cases,—it is real property, and may consequently with propriety be defined as a right annexed to, or issuing out of, or exerciseable within, a hereditament corporeal and real (*b*). Thus, a man may have a right of common of pasture for his cattle, or a right of way (both of which are incorporeal hereditaments) to be exercised over the land of another person ; and these rights are incorporeal, that is to say, intangible, although the profits produced by their enjoyment or exercise may be (and usually are) both corporeal and tangible ; as, for

(*a*) Co. Litt. 20 a.(*b*) Ibid. 6 a, 20 b ; Plowd. 170.

example, the grass, which is the fruit or product of the right of common of pasture. Incorporeal hereditaments consist for the most part—though, as we shall see hereafter, not exclusively—of rights *in alieno solo*; and these are generally either *profits à prendre*, such as the right to feed cattle, or to take fish, and the like; or *easements*, and which are otherwise called privileges without profit, such as a right of way over the land of another man.

Incorporeal hereditaments include (amongst other species not requiring specific notice) *advowsons*, *tithes*, *commons*, *ways*, *watercourses*, *lights*, *offices*, *dignities*, *franchises*, *corodies*, *pensions*, *annuities*, and *rents* (c). But for the discussion of many of these subjects, places more distinctly appropriate will be found hereafter; and therefore in the present chapter we shall direct the reader's attention to the following heads only:—*commons*, *ways*, *watercourses*, *lights*, *franchises*, and *rents* (including *annuities*); and we may here observe in passing, that *commons* have been sometimes called *profits à prendre*, to distinguish them from ways, watercourses, and other *easements*, all which latter are (as we shall see) privileges without profit, enjoyed over the land of another, or (as it is called) *in alieno solo* (d).

I. *Common* (or right of common) is a profit which a man hath in the land of another, as to pasture beasts thereon, to catch fish, to dig turf, to cut wood, or the like (e). And the right derives its name from the community of interest which thence arises between the claimant and the owner of the soil, or between the claimant and other commoners entitled to the same right; all which parties are entitled to bring actions for injuries done to their respective interests—and that both as against

(c) 2 Bl. Com. 21. The enumeration in Hale's Analysis (p. 48), is as follows:—"Rents, services, tithes, commons, and other profits in alieno solo; pensions, offices, fran-

chises, liberties, villeins, dignities."

(d) *Race v. Ward*, 4 Ell. & Bl. 702.

(e) 2 Bl. Com. p. 32; *Lloyd v. Earl Powis*, 4 Ell. & Bl. 485.

strangers and as against each other (*f*). There are five sorts of common—common of pasture, common of piscary, common of turbary, common of estovers, and common in the soil.

1. Common of pasture is the principal and most frequent sort, being the right which a man has to feed his beasts on another's land; and it is either *appendant*, *appurtenant*, *because of vicinage*, or *in gross* (*g*); and note, that things *appendant* (whether common of pasture or other incorporeal hereditament) are "ever by prescription; but "appurtenants may be created, in some cases, at this "day" (*h*).

Common of pasture *appendant* is the privilege belonging to the owners or occupiers of arable land holden of a manor, to put upon the wastes of the manor (usually called *commons*) their commonable beasts; that is, such beasts as are necessary either for the ploughing of the land or for its manuring, viz., horses and oxen, cows and sheep (*i*); but swine, goats, geese, and the like are not commonable (*k*), although in respect of swine there may be a right of *pannage* (*l*). This species of common of pasture is a matter of universal right (*m*); and it originally arose in this manner, that where a lord having a certain extent of waste ground, *enfeoffed* any one of a parcel of arable land to hold of his manor in *socage*, for services to be rendered, it was found necessary to allow the *feoffee* to have common of pasture in the waste ground, as incident to his tenancy; for he could not plough or manure his own land without beasts, nor could he sustain the beasts upon it, while it

(*f*) Robert Mary's case, 9 Rep. 113; Scriven on Copyholds, 6th ed., by Brown, pp. 319, 320, 378, 379.

(*g*) Co. Litt. 122.

(*h*) Ibid. 121 b.

(*i*) Year Book, 37 Hen. 7, 34; F. N. B. 180; 4 Vin. Ab. in tit.

Com. (F.)

(*k*) Bro. Ab. tit. Com. 13; Fin. Law, 56; Co. Litt. 122 a.

(*l*) Chilton v. Corporation of London, 7 Ch. D. 562.

(*m*) 2 Bl. Com. 33; 1 Rol. Ab. 396, l. 44; Co. Litt. ubi sup.

was sown with corn (*n*). From this of course it follows, that it is only in respect of *arable* land that common appendant can be claimed (*o*); though it may be claimed by that name, as appendant to a farm in fact containing pasture at the present day; for the land shall be presumed (where there is usage to sustain the claim) to have been originally arable (*p*). It follows, also, that common appendant is incapable of being created at the present day (*q*); for all manorial tenure must have had existence before the passing of the statute of *Quia emptores*, in the eighteenth year of Edward the first.

Common *appurtenant*, frequently confounded with common *appendant* (*r*), ariseth from no connection of tenure, nor from any absolute necessity; but may be annexed to lands in other lordships, or extend to other beasts besides such as are generally commonable (*s*); as to hogs, goats, geese, or the like. This, not arising from any natural propriety or necessity, like common appendant, is not therefore of general right, but can only be claimed by grant, or by the long usage of particular persons to enjoy the same (*t*); which latter title is commonly called a title by prescription; and is supposed by the law to be founded on a special grant or agreement originally made for this purpose.

[Common *because of vicinage*, or neighbourhood, is where the inhabitants of two townships, which lie contiguous to each other, have usually intercommoned with one another; the beasts of the one straying naturally into the adjoining wastes of the other, without any molestation from either. This, indeed, is only a permissive right, intended to excuse

(*n*) Tyingham's case, 4 Rep. 37 a; Co. Litt. 122 a; Hist. Eng. Law, by Reeves, vol. i. p. 262.

(*o*) 1 Rol. Ab. 397, l. 28, 29.

(*p*) Bac. Ab. Common, (A. 1).

(*q*) 1 Rol. Ab. 396, l. 42; Year Book, 26 Hen. 8, 4 a.

(*r*) Bennett v. Reeve, Willes, 232.

(*s*) Sacheverill v. Porter, Cro. Car. 482; 1 W. Jones, 397, S. C.

(*t*) Tyingham's case, 4 Rep. 36 b; Cowlan v. Slack, 15 East, 108; Morley v. Clifford, 20 Ch. Div. 753.

[what in strictness is a trespass in both, and to prevent a multiplicity of suits; and therefore either township may inclose and bar out the other, though they have intercommoned time out of mind. Neither hath any person of one town a right to put his beasts originally into the other's common: but if they escape from the one common and stray into the other and adjoining common of themselves, the law winks at the trespass (*u*).] In close connection with this, and substantially of the same kind, is the right described in the books as *common of shack*—or the right of persons occupying lands, lying together in the same common field, to turn out their cattle after harvest to feed promiscuously in that field (*x*). Indeed, this kind of common, which in the beginning was but in the nature of a pasture “because of vicinage,” and founded on the same reason, has now long since in many parts of the country insensibly changed its nature; and become, by the force of custom, a right so fixed, that even though the owner of any particular parcel should assume, merely on his own authority, to inclose his land in severalty, it would still continue subject to the antient rights of the intercommoners (*y*); and the right may properly be classed under the head of *common appurtenant*. And originally these lands lying together in a common field were most probably in the nature of *common meadows* (otherwise called *lot-meads*), being lands which time out of mind have been divided between certain persons, a certain quantity or acreage to each in severalty, but the acreage being lotted to them yearly sometimes in one part of the common field and sometimes in another part of it, so that the allottees have (in fact) a moveable fee simple in the certain acreage of each (*z*).

Common *in gross*, or at large, is such as is neither

(*u*) Co. Litt. 122 a; Commissioners of Sewers v. Glasse, L. R., 19 Eq. 160.

(*x*) Corbet's case, 7 Rep. 5;

Cheesman v. Hardham, 1 Barn. & Ald. 710.

(*y*) Corbet's case, ubi sup.

(*z*) Co. Litt. 4 a,

appendant nor appurtenant to land, but is annexed to a man's person, being granted to him and his heirs by deed; or it may be claimed by prescription (*a*); it is a separate inheritance, entirely distinct from any other land that may be vested in the person to whom the right of common belongs, and apparently although he should not have any other land at all.

Common of pasture, of whatever kind, may, in respect of time, be either limited or unlimited; that is, may either be confined to particular seasons of the year, or may last all the year round (*b*); but as regards the number of beasts to be turned on, the right is in general subject to restriction; for all commons (except perhaps those in gross) must be either claimed in respect of some number in particular, or at least in such manner as tends to limit the number, as for all cattle *levant* and *couchant* on the land to which the common is appendant or appurtenant; that is, for so many as the land is capable of maintaining during the winter; and a claim subject to no limitation of either kind, (except perhaps in the case where an express grant to that effect could be shown,) would be void (*c*); but with respect to common in gross, it may be either limited to a particular number; or, *semble*, it may be absolutely unlimited, in which case it is sometimes called a common *without stint*, or *sans nombre* (*d*).

2, 3. Common of *piscary* is a liberty of fishing in another man's water—as common of *turbary* is a liberty of digging turf upon another man's ground (*e*); and with respect to common of turbary, in particular, it may be remarked that, like common of pasture, it may be either by grant or prescription; and may be either appurtenant or

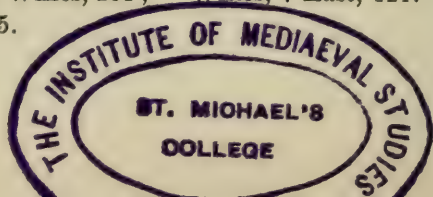
(*a*) 2 Bl. Com. 34; Shuttleworth v. Le Fleming, 19 C. B., N. S. 687.

(*b*) Bl. Com. ubi sup.

(*c*) 1 Saund. by Wms. 28 b, n. (4); Bennett v. Reeve, Willes, 231; Corbet's case, 7 Rep. 5.

(*d*) Co. Litt. 122 a; How v. Strode, 2 Wils. 274; 3 Bl. Com. 237, 239.

(*e*) Co. Litt. ubi sup.; Wilson v. Willes, 7 East, 121.



in gross; but it is usually claimed as appurtenant, and by prescription; and as to a common of turbary of this kind, it cannot be claimed as appurtenant to land, but only to a house (*f*); and it authorizes not the taking of turf except for the purpose of using the same as fuel, in the particular house to which the right is annexed (*g*).

4. [Common of *estovers* or *estouviers* (from *estoffer*, to furnish), is a liberty of taking *necessary* wood, for the use or furniture of a house or farm, from off another man's land; and, like common of pasture, it may be claimed either by grant or prescription. And note that this *common* of estovers is exerciseable *in alieno solo*, differing in this respect from the house-bote, &c. of a tenant for life, which are also called estovers, but which are taken *in suo solo*, *i. e.*, in the land itself of the tenant for life.

5. In addition to the above-mentioned rights of common, there is also common *in the soil*; which consists of the right of digging for coals, minerals, stones and the like (*h*); and this last species, and common of turbary, bear a resemblance to common of *pasture* in many respects, though in one point they go much further: common of pasture being only a right of feeding on the herbage and vesture of the soil, which renews annually; while common of turbary, and of digging for coals, and the like, is a right of carrying away the very soil itself.

By the Statute of Merton (20 Hen. III. c. 4) the lord of a manor might inclose against common of *pasture* (*i*), though not against common of estovers or of turbary (*k*), so much of the waste as he pleased, for tillage or wood ground—provided he left common sufficient for such as were entitled thereto (*l*). This inclosure, when justifiable,

(*f*) Tyingham's case, 4 Rep. 37 a.

(*g*) Valentine v. Penny, Noy, 145; Peppin v. Shakespear, 6 T. R. 748.

(*h*) Co. Litt. 41 b, 122 a.

(*i*) See also 13 Edw. I, c. 46.

(*k*) 2 Inst. 87; Bateson v. Green, 5 T. R. 416; Arlett v. Ellis, 7 Barn. & Cress. 369.

(*l*) Arlett v. Ellis, ubi sup.; and Scriven on Copyholds, 6th ed., by Brown, pp. 307—318.

[is called in law “approving,”—an antient expression, signifying the same as “improving” (*m*). And this right is considered as applying equally to any owner of the waste, though he may not fall within the description of lord of the manor (*n*).] But no one may now approve even against common of pasture, without first giving three months’ notice of his intention to do so, by advertisement in the local papers and otherwise (*o*), and without obtaining the consent of the Board of Agriculture (*p*).

But the inclosure of common fields and waste lands, and the consequent extinction of common rights therein, are objects of so much importance to agricultural improvement, that they were not left in modern times to depend on this antient statute; but were introduced very generally, throughout entire manors and parishes in almost every part of the kingdom, by force of local acts of parliament, passed from time to time for the purpose; and in aid of this practice was passed the statute 41 Geo. III. c. 109, commonly called the “General Inclosure Act,” to consolidate a number of regulations, and to make them applicable (subject only to any special provisions in the local acts) to every case of local inclosure (*q*). And improvements of this description are now effected under the provisions of certain statutes known as “The Inclosure Acts,” of which the chief is the 8 & 9 Vict. c. 118, passed in the year 1845 (*r*). By this Act (which was in substitution for a previous one on the same subject, the 6 & 7 Will. IV. c. 115), after reciting that “it is expedient to “facilitate the inclosure and improvement of commons “and other lands, subject to rights of property which “obstruct cultivation and the productive employment of

(*m*) 2 Inst. 474.

(*n*) *Glover v. Lane*, 3 T. R. 445.

(*o*) 39 & 40 Vict. c. 56, s. 31.

(*p*) 56 & 57 Vict. c. 57.

(*q*) *Doe v. Spencer*, 2 Exch. 692.

(*r*) See also 9 & 10 Vict. c. 70;
10 & 11 Vict. c. 111; 11 & 12 Vict.

c. 99; 12 & 13 Vict. c. 83; 14 & 15

Vict. c. 53; 15 & 16 Vict. c. 79;

17 & 18 Vict. c. 97; 20 & 21 Vict.

c. 31; 22 & 23 Vict. c. 43; 31 & 32

Vict. c. 89; 39 & 40 Vict. c. 56;

41 & 42 Vict. c. 56; 42 & 43 Vict.

c. 37; and 45 & 46 Vict. c. 15.

“labour; and to facilitate such exchanges of lands, and
 “such divisions of lands intermixed or divided into incon-
 “venient parcels, as may be beneficial to the respective
 “owners; and to provide remedies for the defective or
 “incomplete execution, and for the non-execution, of
 “powers created by general and local Acts of inclosure,
 “and to authorize the revival of such powers in certain
 “cases”—an elaborate system of regulations is laid down
 with reference to inclosures; and under these regulations,
 exchanges and partitions of lands may also be effected,
 even where no inclosure is proceeding (s). And the short
 effect of the provisions relative to inclosure are as fol-
 lows:—The Acts establish a board of commissioners
 under the denomination of “The Inclosure Commissioners
 for England and Wales,” and who now constitute the
 Inclosure Department of the Board of Agriculture (t);
 and these commissioners are empowered—on the applica-
 tion of persons interested to the amount of one-third of the
 value of the lands subject to be inclosed (u), and provided
 the consent of persons interested to the amount of two-
 thirds of the value of the land, and of the lord of the

(s) *Minet v. Leman*, 24 L. J.,
 Ch. 545.

(t) 52 & 53 Vict. c. 30.

(u) The lands *subject to be inclosed*
 are (s. 11) as follows:—“All lands
 subject to any right of common
 whatever, and whether such rights
 may be exercised at all times, or
 only at limited times and seasons;
 or subject to any suspensions or
 restrictions in respect of the time
 of enjoyment; all gated and stinted
 pastures in which the property of
 the soil either is or is not in the
 owners of the cattle or other gates
 or stints; all land held, occupied,
 or used in common either at all
 times or during any time or season,
 or periodically, and either for all

purposes or for any limited pur-
 pose, and whether the separate
 parcels of the several owners of the
 soil shall or shall not be known by
 metes or bounds, or be otherwise
 distinguishable; all land in which
 the property or right to the vesture
 or herbage, or any part thereof,
 during the whole or any part of
 the year, or to the wood or under-
 wood growing thereon, is separated
 from the property of the soil; and
 all lot meadows and other lands,
 the occupation or enjoyment of the
 separate lots or parcels of which is
 subject to interchange among the
 respective owners in any known
 course of rotation or otherwise.”

manor (in case the lands be waste of a manor), be ultimately obtained,—to inquire into the case, and to report for the information of parliament with regard to the expediency of making such inclosure; and if thereon an Act be passed to the effect that such inclosure be proceeded with, the allotment and inclosure of the lands take place accordingly,—the proceedings being conducted by the aid of a *valuer* appointed for the purpose, and who values under the superintendence of the commissioners. And the Act of 1845, by sect. 146, declares, that immediately after such allotment and inclosure of the lands shall have been made, or from such other time as shall be fixed after proper notice, the common or other rights, which it is the object of the inclosure to commute, shall be *extinguished* accordingly; and it directs that copies of the award (which is to be under the seal of the commissioners) shall be deposited with the clerk of the peace for the county, and also with the churchwardens of the parish, so that recourse thereto may be freely had by any person interested in the premises. And before concluding our remarks on this subject, we will mention that, by the 39 & 40 Vict. c. 56, commonly called the “Commons Preservation (or Regulation) Act, 1876,” any encroachment on, or inclosure of, a village green or recreation ground, having a known and defined boundary, is declared to be a public nuisance, and summarily punishable before the magistrates; and a civil jurisdiction is given to the county court of the district in the matter of any such nuisance, and that court may accordingly (and as the justice of the case requires) grant injunctions or make orders of removal or abatement.

II. *Ways* are the second species of incorporeal hereditaments which we propose to consider; and by ways, we do not here mean *highways*, which are common to the public, and which consequently belong to (and are hereafter considered under) the division of public rights; but *private ways*, in which one man may have an interest and a right,

though another be owner of the soil of the ways. Such ways may be grounded on express grant, as when the owner of land grants, by deed, to another man the liberty of passing over his (the grantor's) land, to go to church, to market, or the like (*x*) : or they may be by prescription, *i.e.*, by implied grant, as if all the owners and occupiers of such a farm have long used to cross such a ground for such a particular purpose : or by custom or antient usage, as if a similar practice has obtained with respect to all the inhabitants of a certain hamlet (*y*), this antient usage suggesting an original grant, whereby a right of way was antiently created. And upon whichever of these three titles the right may stand, it is capable, like that of common, of being either *appurtenant* to some particular house or land, or *in gross*, and annexed to the person of the grantee ; but the existence of easements *in gross* has latterly been denied (*z*) ; and the correct view regarding easements so called *in gross* appears now to be to either regard them as mere licences, or else to find for them some possible legal origin, as having been originally appendant or appurtenant to some corporeal hereditament (*a*). A right of way may also arise of necessity ; as if A. grants to B. a piece of ground in the middle of his field, he at the same time tacitly and impliedly gives him a way to come to it (*b*) ; for that is necessary to its enjoyment (*c*) ; and he may cross his land for that purpose by some defined way without any trespass ; and if the particular way is out of repair, he may go over any other part of the land (*d*). In like manner a tenant at will shall, after the determination of his interest by the lessor, have free entry, egress, and

(*x*) *Wood v. Leadbitter*, 13 Mee. & W. 838.

(*y*) 2 Bl. Com. 35.

(*z*) *Rangeley v. Midland Rail. Co.*, L. R., 3 Ch. App. 306.

(*a*) *Scriven on Copyholds*, by Brown, 6th ed., pp. 379, 380.

(*b*) *Clarke v. Cogge*, Cro. Jac. 170 ; *Hinchliffe v. Lord Kinnoul*, 5 Bing. N. C. 24, 25 ; *Skull v. Glenister*, 16 C. B., N. S. 81.

(*c*) *Pomfret v. Ricroft*, 1 Wms. Saund. 321, n. 6.

(*d*) 2 Bl. Com. 36 ; *Taylor v. Whitehead*, Doug. 745.

regress into the land, in order to cut and carry away his emblements; for when the law gives a right, it gives everything necessary to the exercise of the right (*e*).

III. *Watercourses* are the third species of incorporeal hereditaments. A watercourse may be defined, generally, as the right which a man has to the benefit of the flow of water; and such right most commonly refers to a river or stream, the banks of which belong either to the claimant on both sides, or to him on one side, and to his neighbour on the other (*f*): in which latter case, it may be remarked that,—unless indeed the river be navigable, for then the bed of it, so far at least as the tide of the sea flows, *primâ facie* belongs to the crown (*g*),—the proprietor of each bank is considered as *primâ facie* the proprietor also of half the land covered by the water; that is, *usque ad medium flum aquæ* (*h*). But a watercourse is distinguishable from the right of merely using the water flowing over the soil, which is incident as of course to the property in the soil itself; for the right to a watercourse involves the right to have the course of the water kept free from any interruption or disturbance to the prejudice of the claimant of the right, by the acts of persons from without and in parts not within his own territory,—whether owing to a diversion of the water, or to obstruction of its flow, or to its pollution by any offensive commixture. This right belongs *primâ facie* to every occupier of land over which a stream passes (*i*); for though running water, air and light are all *publici juris*, yet to a certain extent they are subject to appropriation by force of an actual occupancy (*k*); and he who is in possession of any soil, is *primâ facie* in possession

(*e*) Co. Litt. 55 a, 56 a.

(*f*) Wood *v.* Waud, 3 Exch. 748.

(*g*) Williams *v.* Wilcox, 8 Ad. & El. 333.

(*h*) Hale, De Jure Maris, part i. c. 1; Wright *v.* Howard, 1 Sim. &

Stu. 190.

(*i*) Sury *v.* Piggott, 3 Bulst. 340; Embrey *v.* Owen, 6 Exch. 369.

(*k*) Taylor *v.* St. Helens Corporation, 6 Ch. Div. 264.

also of the free course of the streams which flow over its surface; but streams underground (including wells and springs) are ordinarily of too uncertain a character to admit of this appropriation (*l*). Moreover, the natural right, where it exists, may be divested by express agreement between the parties interested; or by long usage, which is evidence of some antient agreement of that description. And therefore my general claim to have the water of such a stream flowing freely and without disturbance over my land, may be successfully opposed by my neighbour, if he can prove that, by some grant of mine or of my ancestors, he is authorized to keep up a mill or the like, and thereby to cause an obstruction in the flow of the stream—or if he can establish a title by long usage to do so. He has then by grant or by prescription a watercourse for such special purpose; to which the general right I might otherwise have had by occupancy has become subordinate (*m*).

IV. *Lights*, otherwise called “antient lights,” are a fourth species of incorporeal hereditaments, the term being used to express a man’s right to have the access of the sun’s rays to his windows, free from any obstruction by the occupier of adjoining land (*n*); and this is so (at least since 1833 it has been so) even within the city of London (*o*), and in other large towns. For the element of light, like that of water, is capable, to a certain extent,

(*l*) *Wood v. Waud*, 3 Exch. 748; *Race v. Ward*, 4 Ell. & Bl. 702; *Chasemore v. Richards*, 2 H. & N. 168; *Acton v. Blundell*, 12 Mee. & W. 324; *Ballard v. Tomlinson*, 29 Ch. D. 115.

(*m*) *Sampson v. Hoddinott*, 1 C. B. (N. S.) 590; *Ormerod v. Todmorden*, 11 Q. B. D. 155; and (as to artificial watercourses) *Arkwright v. Gell*, 5 Mee. & W. 203; and *Magor v. Chadwick*, 11 Ad. &

Ell. 571.

(*n*) *Aldred’s case*, 9 Rep. 58 b; *Jones v. Tapling*, 11 C. B. (N. S.) 283; 12 C. B. (N. S.) 826; *Clarke v. Clark*, Law Rep., 1 Ch. App. 16; *Yates v. Jack*, *ib.* 295; *Plate Glass Co. v. Prudential Assurance Co.*, 6 Ch. Div. 757; *Russell v. Watts*, 25 Ch. Div. 559; 10 App. Ca. 590.

(*o*) *Yates v. Jack*, *ubi sup.*, referring to 2 & 3 Will. 4, c. 71, s. 3.

of appropriation by mere occupancy—a man on his own land having a right to all the light which will come to him; and he may erect a house (even at the boundary line of his property, and so as to overlook his neighbour) with as many windows as he pleases; and by force of some grant, or by prescription, he may be entitled to maintain these windows in freedom from all obstruction (*p*); although in the absence of any grant, and before any prescriptive right has arisen, it is competent to the owner of the adjoining land, by a wall or otherwise, to intercept or to obstruct the light, and so to prevent the easement from arising (*q*).

V. [*Franchises*, otherwise called *liberties*, are a fifth species of incorporeal hereditaments, and may be defined as a royal privilege, or branch of the crown's prerogative, subsisting in the hands of a subject (*r*); and being therefore derived from the crown, franchises must either arise from royal grant, or be held by prescription, which presupposes such a grant (*s*). The kinds of franchises are various and almost infinite; we will here mention only some of the principal, premising that they may be vested either in natural persons or in bodies politic; in one man or in many; but the same identical franchise that has before been granted to one, cannot be bestowed on another, for that would prejudice a former grant (*t*).

To be a county palatine is a franchise vested in a number of persons. It is likewise a franchise for a number of persons to be incorporated, and to subsist as a body politic, with power to maintain perpetual succession, and to do other corporate acts; and each individual

(*p*) *Blanchard v. Bridges*, 4 Ad. & Ell. 195; *Bullers v. Dickinson*, 29 Ch. D. 155; *Beddington v. Atlee*, 35 Ch. D. 317.

(*q*) *Blanchard v. Bridges*, ubi sup.; *Bonner v. Great Western*

Rail. Co., 24 Ch. D. 1.

(*r*) *Finch*, L. 164.

(*s*) *Co. Litt.* 114 a; *Goodman v. Mayor of Saltash*, 7 App. Ca. 633.

(*t*) 2 Roll. Ab. 191; *Keilw.* 196.

[member of such a corporation is also said to have a franchise.] So there may be a franchise to have a bailiwick or liberty exempt from the sheriff of the county, wherein the grantee only and his officers are to execute all process ; but such a franchise is at the present day dying out (*u*). On the other hand there are many franchises exercisable by lords of manors, as annexed to their *manors* ; as for a man to hold a court leet, in certain cases ; or to have waifs, wrecks, estrays, treasure-trove, royal fish, and forfeitures ; the nature of all which will more particularly appear when we come to speak of the crown's prerogatives (*x*) : to have a fair, market, ferry, or the like,—with the right of taking toll there : or to have forest, chase, park, warren, or fishery ; *deodands* also were a species of franchise, but they have now been abolished (*y*). Among franchises, there are many which belong, in point of arrangement, to other parts of the present treatise ; but to others more particular notice is due in this place.

1. And, first, as to fairs, markets, and ferries. A man may have a right to hold a fair or market, or to keep a boat for the ferrying of passengers ; and this either by Act of Parliament, by royal grant, or by prescription (*z*). But no other title than these will suffice ; for no fair, market, or ferry can be lawfully set up without licence from the crown (*a*). On the other hand, a man may, under such titles, lawfully claim to be lord of a fair or market, though he be not the owner of the soil of the place whereon it is held (*b*) ; or to be the proprietor of a ferry (*c*), though he be not the owner either of the

(*u*) 13 & 14 Vict. c. 105 ; 21 & 22 Vict. c. 22.

(*x*) Vide post, bk. iv. pt. i. c. vi.

(*y*) 2 Bl. Com. 37 ; 9 & 10 Vict. c. 62 ; vide post, bk. iv. pt. i. c. vii.

(*z*) 2 Inst. 220 ; Trotter v. Harris, 2 Y. & J. 285.

(*a*) 2 Inst. 220 ; R. v. Marsden, 3 Burr. 1812 ; Willes, 512, (n.) ;

Com. Dig. Piscary, B. ; Hale, *de Jure Maris*, part i. c. 2.

(*b*) Bac. Ab. Fairs, &c. D. n. (*a*) ; Mayor of Northampton v. Ward, 2 Stra. 1238 ; 1 Wils. 107 ; R. v. Starkey, 7 Ad. & E. 106.

(*c*) Newton v. Cubitt, 12 C. B., N. S. 32 ; Letton v. Goodden, Law Rep., 2 Eq. Ca. 123.

water over which it is exercised (*d*), or of the land on either side of the river (*e*); but, in such cases, he must possess over the soil such rights, at least, as will authorize him to embark and disembark his passengers thereon (*f*). The right to take toll, also, from the customers, is usually—though in the case of a fair or market not necessarily—a part of the privilege (*g*); and the tolls of a fair or market are due either in respect of goods sold there (that is, from the seller, not the buyer), or for stallage or pckage, or the like, in respect of stalls or poles fixed in the soil (*h*). But the right of the crown to authorize the collection of tolls is viewed by the law with a salutary jealousy; so that no burthen of that kind can be imposed on the public, unless it have had a reasonable commencement (*i*); that is to say, unless it be founded on an adequate consideration, as between the public and the grantee: which consideration, in the case of a fair or market, is the duty incumbent on the grantee to provide ground for the purpose, and to regulate the proceedings; in that of a ferry, to keep up a boat for passage over a stream not otherwise fordable (*k*). And it is also essential that the burthen be reasonable in its amount (*l*); for where the tolls granted are outrageous, the franchise is illegal and void (*m*). It is, however, to be remarked, that, when any one of the privileges in question can be shown to exist, the party entitled to it has a right of action, not only against those who refuse or evade payment of toll where it is due, but also against those who disturb his franchise by setting up a new fair, market, or ferry, so near to his as to

(*d*) Com. Dig. in tit. Piscary, B.

(*e*) Peter *v.* Kendal, 6 B. & C. 703.

(*f*) Ibid.

(*g*) Heddy *v.* Wheelhouse, Cro. Eliz. 558, 592; Lord Egremont *v.* Saul, 6 Ad. & El. 924; R. *v.* Starkey, 7 Ad. & El. 106.

(*h*) 2 Inst. 219.

(*i*) 2 Bl. Com. 37; Mayor of Nottingham *v.* Lambert, Willes, 116.

(*k*) Heddy *v.* Wheelhouse, Cro. Eliz. 558, 592.

(*l*) 2 Inst. 219.

(*m*) Stat. Westm. 1 (3 Edw. 1), c. 31; 2 Inst. 219; Cro. Eliz. ubi sup.; 2 Bl. Com. 37; Willes, 116.

diminish his custom (*n*); while on the other hand he is himself liable to be criminally indicted, if by his wilful act, or even by his neglect of duty, the subjects of the realm are obstructed in their lawful use of the franchise (*o*). And we may also observe that the legislature has, more especially of recent years, enacted divers provisions for the establishment and subsequent regulation of fairs and markets, and which provisions are either of a general applicability to all fairs and markets (*p*), or relate exclusively to some particular market, *e.g.*, the Greenwich market (*q*) or the market at Smithfield (*r*); and some of them prescribe the days for holding the market (*s*); and others of them provide for the abolition of certain fairs (*t*), and for the suppression of fairs that are deemed unlawful (*u*).

2. Secondly, as to the franchises of forest, chase, park, warren, and fishery,—

A *forest* is the right of keeping, for the purpose of venary and hunting, wild beasts and fowls of forest, chase, park, and warren, in a certain territory or precinct of woody ground or pasture set apart for the purpose (*x*). By our law, no man can make title to animals *feræ naturæ*, being and remaining wild; and though a man may take or kill on his own lands animals *feræ naturæ*, so that he invade not any exclusive franchise of sporting, which another person may possess over the same lands, yet he is not at liberty to confine beasts of venary in a wild state

(*n*) 2 Roll. Ab. 140; Com. Dig. Action on the Case for a Nuisance, (A.); Manchester Corporation *v.* Lyons, 22 Ch. Div. 287; Goldsmid *v.* Great Eastern Rail. Co., 25 Ch. Div. 511; 9 App. Ca. 927; Att-Gen. *v.* Horner, 14 Q. B. D. 245; Abergavenny (Commissioners) *v.* Straker, 42 Ch. D. 83.

(*o*) Willes, 512, (*n.*); Payne *v.* Partridge, 1 Show. 231.

(*p*) The Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14).

(*q*) 12 & 13 Vict. c. 25.

(*r*) 14 & 15 Vict. c. 61.

(*s*) 36 & 37 Vict. c. 37; and see also 27 Hen. 6, c. 5.

(*t*) 34 & 35 Vict. c. 12.

(*u*) 31 & 32 Vict. c. 106.

(*x*) Co. Litt. 233 a; Manwood, Forest Laws, 41, 52, edit. 1665.

within a particular precinct, for the mere purpose of diversion (even though on his own soil); for this is in the nature of an unlawful monopoly (*y*); and this is so, notwithstanding that some kinds of animals *feræ nature*, such as deer, rabbits, and the like, may be lawfully kept by any person in an enclosed place, if preserved as *property*, and not merely for the purpose of the chase (*z*). But the right to keep up animals in a wild state for mere diversion, though forbidden to the subject, has been at all times admitted as a matter of prerogative in the sovereign; [for we find, that even among the Saxons there were woody and desert tracts called forests, which were filled with great game, reserved by the sovereign for his own pleasure and protected by heavy pecuniary penalties; and the subject had full liberty of sporting on his own land provided he abstained from the king's forests, as is fully explained in the laws of Canute (*a*); which indeed was the antient law on the Scandinavian continent (*b*), from whence Canute probably derived it (*c*).] Afterwards, upon the Conquest, the Norman race of sovereigns exceeded even their predecessors in the eager enjoyment of this branch of the prerogative; for not only did they extend the limits of the antient forests, by encroachment on the lands of their subjects (*d*), but they established a particular system of *forest law* (*e*), which was apparently of a most tyrannical and oppressive character (*f*): so that our ancestors were as zealous for the reformation of the forest

(*y*) Case of Monopolies, 11 Rep. 87 b; 2 Inst. 199; Com. Dig. Chase (D).

(*z*) Davies *v.* Powell, Willes, 48; Morgan *v.* Abergavenny, 8 C. B. 768.

(*a*) Wilk. Leg. Angl. Sax. LL. Can. c. 77.

(*b*) "*Cuique in proprio fundo quamlibet feram quoquo modo venari permissum.*"—Stiernhook, de Jure Sueon. l. 2, c. 8.

(*c*) 2 Bl. Com. 415.

(*d*) Manw. 319; 4 Inst. 300, 301.

(*e*) 1 Hist. Eng. Law, by Reeves, 206.

(*f*) "The penalty for killing a stag or boar was loss of eyes—for William loved the great game," says the Saxon Chronicle, "as if he had been their father."—Hallam's Mid. Ages, vol. ii. p. 426, 7th edit.

laws as for the relaxation of the other feudal rigours, and struggled for the *Charta de Forestâ*, as strenuously as for the Great Charter itself (*g*). By the *Charta de Forestâ*, which was confirmed in parliament in the ninth year of Henry the third, many forests unlawfully made (or at least many precincts added by unlawful encroachment to the antient forests) were *disafforested* (*h*),—though in the case of such precincts, called thenceforward *purlicus*, the crown still continued to exercise certain of its privileges (*i*); and in the forests that remained entire, many abuses were reformed and the severity of punishments was mitigated. And by reason of the variety of statutes afterwards made for the amelioration of the forest laws, this branch of the prerogative (which, after it had begun to decline, Charles the first unsuccessfully attempted to revive) (*k*) has long ceased to be a grievance to the subject (*l*). Many of the royal forests however still exist; and of them some are of a known origin, such as the New Forest in Hampshire, founded by the Conqueror (*m*), that of Windsor by Henry the eighth, and that of Richmond by Charles the first (*n*), while others of them are of such remote antiquity, that no trace is said to remain in history of their first creation; and of these latter we may instance the forest of Epping (*o*), the forest of Hainault (*p*), the forest of Whichwood (*q*), the forest of Whittlewood (*r*), the forest of Woolmer (*s*), the forest of Delamere (*t*), and the forest of Dean (*u*); and

(*g*) 2 Bl. Com. 416.

(*h*) Hist. of Eng. Law, by Reeves, vol. i. p. 254; 4 Inst. 300.

(*i*) 4 Inst. 303, 304; Com. Dig. Chase, 1.

(*k*) Hallam's Const. Hist. vol. ii. p. 13; 16 Car. 1, c. 16.

(*l*) 2 Bl. Com. 416.

(*m*) 14 & 15 Vict. c. 76; 16 & 17 Vict. c. 19; and 17 & 18 Vict. c. 49.

(*n*) Hallam's Const. Hist. vol. ii. p. 14, n., 3rd ed.

(*o*) 34 & 35 Vict. c. 93; 35 & 36

Vict. c. 95; 36 & 37 Vict. c. 5; and 38 & 39 Vict. c. 6.

(*p*) 14 & 15 Vict. c. 43; 21 & 22 Vict. c. 37; and 29 & 30 Vict. c. 62.

(*q*) 16 & 17 Vict. c. 36; and 19 & 20 Vict. c. 32.

(*r*) 16 & 17 Vict. c. 42; and 28 & 29 Vict. c. 16.

(*s*) 18 & 19 Vict. c. 46.

(*t*) 19 & 20 Vict. c. 13.

(*u*) 24 & 25 Vict. c. 40; 29 & 30 Vict. c. 70; and 34 & 35 Vict. c. 85.

it is said that, in England alone, there are altogether sixty-nine royal forests (*x*).

A forest, although a royal possession, is capable of being vested in a subject (*y*); for if the sovereign grants a forest to a private person, with words expressly authorizing the administration of forest law there, the grantee will have the franchise of a forest to its full extent, with all the appropriate courts and officers (*z*); and a forest is a right which the owner thereof (whether sovereign or subject) may have either in his own lands or in the lands of another (*a*): and in this respect it differs from a right of common, and the other incorporeal hereditaments above described; for these rights of common, as they issue out of the soil, cannot exist in the same man who is owner of the soil itself, (the latter title superseding all inferior claims like these,) and are consequently rights which a man can claim to exercise only in *alieno solo* (*b*); but a forest, and indeed all franchises in general, are inheritances collateral to the ownership of the land (*c*), and may be claimed by a man either in *proprio solo* or in *alieno solo* (*d*). The owner of a forest is also considered (notwithstanding the general rule that title cannot be made to things *feræ naturæ*) as having a qualified property in the wild animals of chase and venary there found, so long as they continue there; and no other person can lawfully take them within those precincts, or chase them from thence and take them in other ground (*e*). But if a wild animal strays from the forest, it ceases to be the property of the owner of the franchise, and will belong to the first taker (*f*).

(*x*) 4 Inst. 293, 294. In 4 Inst. 319, the number sixty-nine is the number given.

(*y*) Co. Litt. 233 a.

(*z*) Case of Leicester Forest, Cro. Jac. 155.

(*a*) 4 Inst. 301, 318; Lord Dacre v. Tebb, 2 Bl. Rep. 1151; Sutton v. Moody, Ld. Raym. 251; Robin-

son v. Duleep Singh, 11 Ch. Div. 798.

(*b*) Lloyd v. Powis, 4 El. & Bl. 485.

(*c*) 4 Inst. 318.

(*d*) 2 Bl. Com. 38.

(*e*) Sutton v. Moody, Ld. Raym. 251.

(*f*) 12 Hen. 8, f. 10; Keilw. 30.

A *chase* is a franchise granted by the crown to a subject, empowering the latter to keep for his diversion, within a certain precinct so called, the wild animals of chase, which in a legal sense are the same with those to which the right of forest extends (*g*); but the franchise does not authorize the establishment of forest law within such precinct (*h*).

A *park* properly signifies an inclosure, and is popularly applied to any ground which a gentleman chooses to surround with a wall or paling, and to stock with a herd of deer; but in the technical sense in which we now use the term, a park is nearly equivalent to a chase, being in effect no other than a chase *inclosed* (*i*).

A *free-warren* is a similar franchise (*k*), granted by the crown to a subject, for preservation or custody of beasts and fowls *of warren*; which, according to Lord Coke, are “hare, coney, roe,” “partridge, quail, rail, &c.,” “pheasant, woodcock, &c.,” “mallard, heron, &c.” (*l*); but “grouse” are not fowls of warren (*m*). To this, as well as to chase and park, apply generally the principles which have been before noticed in respect of a forest; with this exception, however, as to a park, that it is incapable of being claimed *in alieno solo*, and can exist only in land belonging to the owner of the franchise himself; although something analogous to the right of *park* may possibly be reserved by the owner on the sale of his land.

A *free fishery* (*n*), or the exclusive right of fishing in a

(*g*) Co. Litt. 233 a.

(*h*) Manw. 52; 2 Bl. Com. 415.

(*i*) Manw. 52; 2 Bl. Com. 38.

(*k*) See Bro. Ab. tit. Warren; Co. Litt. 2 a, 114 b; Keilw. 148, n.; Wadhurst *v.* Damme, Cro. Jac. 45; Vere *v.* Lord Cawdor, 11 East, 568; Merest *v.* Harvey, 5 Taunt. 442; Pannell *v.* Mill, 3 C. B. 625.

(*l*) Co. Litt. 233 a; Manw. 95; Barrington's case, 8 Rep. 138 b.

(*m*) Duke of Devonshire *v.* Lodge, 7 B. & C. 36.

(*n*) Hale, de Jure Maris, part i. c. 4; Lord Fitzwalter's case, 1 Mod. 105; Case of River Banne, Davies, 55; Mannall *v.* Fisher, 5 C. B. (N. S.) 856; The Free Fishers of Whitstable *v.* Gann, 13 ib. 853.

public river, is also a royal franchise (*o*). In private rivers (viz., in those not navigable), as the bed or soil, so the right of fishing, presumably belongs to the owners of the land on either side, and to them only (*p*); but in those which are public,—that is, navigable,—while the bed (so far at least as the tide flows) appertains to the crown, the right of fishing belongs *primâ facie* to the public at large (*q*). But in either public or private rivers, there may be a particular title in some individual, by which such presumptive right may be controlled, that is to say, by which the public right may be excluded; and this may take place, in a public river, by force of some royal grant or some prescription entitling a private person and his heirs to the exclusive right of fishing therein (*r*): a privilege called in the books a “free fishery” (*s*), and sometimes called also a “several fishery” (*t*). Grants of this description can no longer be made by the crown (*u*); being prohibited by King John’s great charter (*v*), and the second and third confirmations of it in the reign of his successor, whereby also the right of making *weirs* in our public rivers was restrained (*x*); but the right of making such grants, prior to its prohibition, was considered as one of the flowers of the prerogative; and it is from this origin that the validity of a free

(*o*) Seld. Mar. Claus. i. 24;
Craig, de Jure Feod. II. 8, 15.

(*p*) Hale, de Jure Maris, part i.
c. 4.

(*q*) Hale, ubi sup. cc. 1, 2, 4.

(*r*) Ward v. Cresswell, Willes,
265; Mayor, &c. of Orford v.
Richardson, 4 T. R. 437; Bagott
v. Orr, 2 Bos. & Pul. 472; Blundell
v. Catterall, 5 B. & Ald. 268;
Williams v. Wilcox, 8 Ad. & E.
333; Rolle v. White, Law Rep.,
3 Q. B. 286; Leconfield v. Lons-
dale, ib. 5 C. P. 657.

(*s*) 2 Bl. Com. pp. 39, 40; Pearce
v. Scotcher, 9 Q. B. D. 162; Neill
v. Duke of Devonshire, 8 App. Ca.
135.

(*t*) Holford v. Bailey, 8 Q. B.
1000; Marshall v. Ulleswater Steam
Navigation Company, 3 B. & Smith,
732; Carlisle v. Graham, Law Rep.,
4 Exch. 361; Bristow v. Cormican,
3 App. Ca. 641.

(*u*) Duke of Somerset v. Fogwell,
5 B. & Cress. 875.

(*v*) Cap. 47, edit. Oxon.

(*x*) Williams v. Wilcox, 8 Ad. &
E. 314.

fishery at the present day must in every case be derived; but if a free fishery should have fallen to the crown by forfeiture, it may, *semble*, be re-granted (*y*). Free fishery, it need hardly be observed, is a franchise, and is wholly different from the right of *common of piscary* formerly mentioned, the latter not being a franchise at all, but a right created by the grant of a subject; also, in a free fishery, a man has a qualified property in the fish before they are caught; while in a common of piscary, he has no property at all till capture (*z*).

VI. *Rents* (including *annuities*) are the last species of incorporeal hereditaments that we propose to notice. The word rent, *reditus*, signifies a compensation or return yielded periodically, to a certain amount, out of the profits of some corporeal hereditament, by the tenant thereof. First, it is *yielded*, that is, paid as a thing due; and therefore it is said, by the antient lawyers, to *lie in render*, in contradistinction to those incorporeal hereditaments, (as common or the like,) which the party entitled thereto is to take for himself, and which are, consequently, said to *lie in prendre* (*a*). Secondly, it is of certain amount, or that which may be reduced to certainty, by either party; for *certum est, quod certum reddi potest* (*b*). Thirdly, it is payable periodically; as yearly, or in every second, third, or fourth year, or the like (*c*). Again, it is considered as payable out of the profits of the land, and must consequently not be part of the land itself (*d*); wherein it differs from an exception in a grant, which is always part of the thing granted (*e*). Hence, there cannot be reserved, by way of rent, the vesture or herbage of the land demised (*f*); though there is no occasion for rent to be, (as it usually is,)

(*y*) Mayor of Colchester *v.*
Brooke, 7 Q. B. 385.

(*z*) 2 Bl. Com. 40; F. N. B. 88.

(*a*) Burton, Compend. 375.

(*b*) Co. Litt. 142 a.

(*c*) Co. Litt. 47 a.

(*d*) Ibid. 141 b, 142.

(*e*) 8 Rep. 71; Co. Litt. 142 a.

(*f*) Co. Litt. ubi sup.

a sum of money; for spurs, capons, horses, corn and other matters may be rendered by way of rent (*g*). Moreover, as the general rule, it must issue out of hereditaments *corporeal*; therefore a rent cannot be reserved out of a common, a franchise, or the like (*h*); or generally out of any incorporeal hereditament (*i*). And, lastly, the person from whom it is due must be the tenant of the land; but his tenancy may be either in possession, remainder or reversion; for a rent may be as well reserved upon the grant of a reversion or remainder, as on the conveyance of an estate in possession (*k*).

There were known to the common law three manner of rents, viz. rent-service, rent-charge, and rent-seck (*l*). *Rent-service* is where the rent accrues in connection with a tenure, attended (as tenure almost invariably is) by fealty, or by fealty and other services (*m*); and this, whether the party to whom the rent is due be entitled to fealty as having the reversion of the land out of which the rent issues, or as having the mere seigniorship. Thus if A., seised in fee, make a gift of land to B. in tail,—or demise to him for life, or years,—reserving a rent; or if B. be seised in fee of a tenement holden of A. as lord of a certain manor, at a certain antient rent,—such rent is, in either case, rent-service: for it is due as from a tenant owing fealty to his lord. To rent of this description, the common law attached as of common right,—and independently of any express provision for that purpose between the parties (*n*),—the power of *distress* which was incident to the fealty due by the tenant to his landlord (*o*); that is, the lord was entitled, in the event of the rent falling into arrear, to enforce payment without legal process, by entering upon the

(*g*) *Doe v. Benham*, 7 Q. B. 982.

(*h*) Co. Litt. ubi sup. 144 a, 47 a; Gilb. Rents, 20.

(*i*) *Musket v. Hill*, 5 Bing. N. C. 694; *Martyn v. Williams*, 1 H. & N. 817.

(*k*) Co. Litt. 47 a, 142 a; Bac. Ab. Rent B.

(*l*) Litt. s. 213.

(*m*) Ibid.; Co. Litt. 122 a.

(*n*) Litt. s. 214.

(*o*) Gilb. on Rents, pp. 3, 5.

land, and seizing the goods and chattels found thereon; and this common law right of distress attached also to the rent payable by a tenant at will, although by reason of there being no fealty in such a case, such rent was not properly a rent-service (*p*).

The other two species of rent differ from rent-service, in having no connection with fealty; and more particularly—a *rent-charge* is where the owner of the rent has neither seigniorship nor reversion, and can consequently claim no fealty; yet is entitled to distrain by force of an express contract; as where a man by deed conveys to another his *whole* estate in fee simple, with a certain rent payable to him thereout, and adds to the deed a covenant or clause of distress; viz.—that, if the rent be in arrear, it shall be lawful to distrain for the same (*q*); or where a man by deed grants out of the land whereof he is seised, a certain rent payable to another, with a like clause of distress (*r*). In either of these cases, the land is liable to the distress, not of common right, but by virtue of the clause in the deed; and therefore it is called a rent-charge, because in this manner the land is *charged* with a distress for the payment of it (*s*). Rent-charges are commonly created by wills and marriage settlements; and when created otherwise, they required (under 18 & 19 Vict. c. 15, ss. 12—14) to be in general registered in the Common Pleas; and now (under the 51 & 52 Vict. c. 51) they are to be registered in the office of Land Registry. Also, rent-charges, in whatever way created, were in law regarded as being entire and indivisible; so that to have released the rent-charge in part,—or to have released in part the lands charged therewith,—was to release the whole rent and the whole of the lands charged; but the law is now the reverse in both these particulars (*t*).

(*p*) Co. Litt. 57 b.

(*q*) 2 Bl. Com. 42; Litt. s. 217.

(*r*) Litt. s. 218.

(*s*) Ibid. s. 217.

(*t*) 22 & 23 Vict. c. 35, s. 10;

Booth v. Smith, 14 Q. B. D. 318;

Baynton v. Morgan, 21 Q. B. D.

101; and, on appeal, 22 Q. B. D. 74.

As for a rent-seek, *reditus siccus*, it is where the owner of the rent has neither seigniorship nor reversion, nor any such express power of distress as above described. Thus, in any of the cases of rent-charge we have just mentioned, if no clause of distress were inserted in the deed, the rent would be rent-seek (*u*).

We must be careful, however, to distinguish here between the two kinds of rent last above described and an *annuity* (which, unless charged upon some real estate, is a yearly sum chargeable only upon the *person* or upon the personal estate of the grantor) (*v*). Therefore, if a man by deed grant to another the sum of 20*l.* per annum, without expressing out of what lands it shall issue, no land at all shall be charged with it, but it is a mere personal annuity (*x*) and does not belong to the class of things real; though, (by an anomaly which has sometimes led to confusion,) a man may have an estate of inheritance in it; that is, it may be made descendible to his heirs, while personalty in general can devolve only upon the executors or administrators (*y*).

There are also other species of rents mentioned in the books; which are, however, when examined, reducible to one or other of the three above enumerated. *Rents of assize* are rents at which the freeholders or copyholders of a manor have held under the lord from time immemorial (*z*); [and they cannot be departed from or varied; those of the freeholders being frequently distinguished as *chief rents* (*reditus capitales*), and both sorts being indifferently denominated *quit rents* (*quieti reditus*), because thereby the tenant was quit and free of all other services. When these payments were received in silver or white money, they were antiently called white rents, *reditus albi*, in contradistinction to rents reserved in grain or baser money, which were called

(*u*) Litt. ss. 217, 218.

(*v*) Co. Litt. 144, 20 a, and n. (4),
by Harg.; Sollory v. Leaver, Law
Rep., 9 Eq. Ca. 22.

(*x*) 2 Bl. Com. 40; Co. Litt.
147 a.

(*y*) Co. Litt. 2 a, 20 a; Aubin v.
Daly, 4 B. & Ald. 59.

(*z*) 2 Inst. 19.

[*reditus nigri*, or black mail (*a*).] Quit rents, being connected with a tenure by fealty, are consequently rent-service; from which it follows that the lord is entitled, as of common right, to distrain for them when they fall into arrear (*b*). *Rack rent* is a term expressive only of the proportion a rent bears to the value of the tenement on which it is charged, or in respect of which it is reserved (*c*): the rent being so termed when it is of the full value of the tenement or near it. A *fee farm rent* is where an estate in fee is granted subject to a rent in fee, of at least one-fourth of the value of the lands at the time of its reservation (*d*); and such rent appears to be called fee farm, because a grant of lands reserving so considerable a rent, is indeed only letting lands to farm in fee simple, instead of the usual method of letting them for life or years; and it results from former explanations, that such a rent, if created by a subject since the statute of *Quia emptores*, can never be a rent-service, for no fealty can be due to the grantor; and it must therefore be either a rent-seck or a rent-charge (*e*).

These are the general divisions of rent; but though their correct apprehension is still of importance, the differences which formerly existed as to the remedies to be pursued in case of their non-payment, are, for practical purposes, nearly at an end; for it has been provided by the statute 4 Geo. II. c. 28, s. 5, that any rent-seck, rent of assize, or chief rent, which has been duly answered or paid for a limited period prior to the date of that Act, or which shall at any time thereafter be created,—may be recovered by the remedy of distress in the same manner as if such rent had been reserved upon a lease (*f*). Also, the Convey-

(*a*) 2 Inst. 19.

(*b*) 2 Watk. Cop. 191.

(*c*) 2 Bl. Com. p. 43.

(*d*) Co. Litt. 143 b; Co. Litt. by Harg. 144 a, n. (5).

(*e*) Doug. 627, n. (1); and see Litt. 217.

(*f*) *Musgrave v. Emmerson*, 16 L. J. (Q. B.) 174; and bk. v. ch. i. *infra*.

ancing Act, 1881 (*g*), contains the following general provisions regarding the recovery of rents which are in arrear, and also regarding the redemption of certain kinds of rents, that is to say:—Firstly, by sect. 44, any annual sum, whether charged on land or on the income of land, and whether payable half-yearly or otherwise (not being rent-service incident to a reversion), may, when in arrear for twenty-one days, be recovered by distress; and when in arrear for forty days, may be recovered either by entry upon and perception of the profits of the land or by means of a demise of the land to a trustee for a term of years, upon trust by mortgage, sale, or otherwise to raise the arrears together with the expenses; but these powers are, of course, subject to any prior estates or interests in the land; and the powers are applicable only where the document creating the rent comes into operation after the 31st December, 1881. And secondly, by sect. 45, a quit-rent, chief-rent, perpetual rentcharge, or other perpetual annual sum issuing out of land (not being tithe-rentcharge or rent reserved under a lease or upon a sale or building grant), whensoever created, may be redeemed at the option of the owner (or part-owner) of the land, upon payment or tender to the owner of the rent (being an absolute owner or an owner otherwise competent to give a receipt therefor) of the amount certified, as the price of redemption, in and by a certificate of the Board of Agriculture (Copyhold Department) to be obtained by the landowner desirous of redeeming the rent; and he is to give the rent-owner one calendar month's notice of his intention to pay or tender such amount for the redemption of the rent; and on proof of such payment or tender, so made after such notice as aforesaid, the Board grants its certificate of redemption, and the land is thereupon and thereby absolutely freed and discharged of the rent. And we may here add, that with regard to rents belonging to a

charity, the fact that they have been paid for twelve consecutive years is now made *prima facie* evidence that such rents are perpetual rents, and it is no longer necessary, as it was heretofore, to show the origin of such rents (*h*): such rents will, however, be redeemable under the 45th section of the Conveyancing Act, 1881, above referred to.

With respect to the manner of creating rents, the owner of land may either grant thereout a rent, or he may grant the land itself, subject to a rent (*i*). Rent-charge or rent-seck may be constituted in either of these ways; rent-service in the latter only (*j*).

[Rent is due and payable upon the land from which it issues,—that is, if no particular place be mentioned in the reservation (*k*). But in the case of the sovereign, the payment must be either to the crown officers at the Exchequer, or to a receiver in the country (*l*). And, strictly, rent is demandable and payable before the time of sunset of the day whereon it is reserved (*m*), though some have said that it is not absolutely due till midnight (*n*).]

By the common law, if the estate or interest of the person entitled to the rent came to an end, in the interval between one of the days of payment and another (as where it determined by death, supposing the lessor to have been tenant for life), the periodical sum then accruing was entirely lost to him and his representatives (*o*); and supposing the rent itself not to determine, but to continue payable to some person in remainder or reversion, the whole sum accruing in respect of such interval would have belonged to that person, though the greater portion of such period might have elapsed in the time of his predecessor. But, in extension of some prior enactments, passed

(*h*) 54 & 55 Vict. c. 17, s. 5.

(*i*) *Anon. v. Cooper*, 2 Wils. 375.

(*j*) Litt. ss. 217, 218.

(*k*) Co. Litt. 201 b.

(*l*) 4 Rep. 73.

(*m*) Co. Litt. 202 a; *Acocks v.*

Phillips, 5 H. & N. 114; *Tutton v. Darke*, ib. 647.

(*n*) 1 Saund. 287; *Lord Rockingham v. Penrice*, 1 P. Wms. 178.

(*o*) *Jenner v. Morgan*, 1 P. Wms. 392.

to amend the common law on this head, it has now been provided by "The Apportionment Act, 1870" (33 & 34 Vict. c. 35), which repeals but re-enacts with amendments certain prior Acts (*p*), that after the passing of that statute, all rents and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise), shall be considered as accruing from day to day, and shall be *apportionable* in respect of time accordingly; that the apportioned part of the same shall be payable, in the case of a continuing rent, annuity, or other such payment, as soon as the entire portion of which it forms a part shall become due, and not before; and in the case of a rent, annuity, or other such payment, determined by re-entry, death, or otherwise, as soon as the next entire portion would have been payable, and not before (*q*): and that all persons entitled to the same and their respective representatives (and also the representatives and assigns of persons whose interests determine with their own deaths), may recover such apportioned part as they might have done the entire portion, if entitled thereto respectively (*r*). The Act, however, contains a proviso, that the entire or continuing rent, including such apportioned part, shall be recovered by the heir or other person who, had the rent not been apportionable, would have been entitled to the entire portion; and that such apportioned part shall be afterwards recoverable by action from such heir or other person, by the executors or other persons entitled under the Act to claim the same; and of course the Act may be (but it hardly ever is) excluded by the instrument creating the rent. Moreover, the Act has no application to, *e.g.*, the premiums payable on a policy of life assurance (*s*).

(*p*) 11 Geo. 2, c. 19; 4 & 5 Will. 4, c. 22; 6 & 7 Will. 4, c. 71; 14 & 15 Vict. c. 25; 23 & 24 Vict. c. 154; *Cattley v. Arnold*, 1 J. & H. 651; *Whitehead v. Whitehead*, Law Rep., 16 Eq. Ca. 528.

(*q*) 33 & 34 Vict. c. 35, s. 3.

(*r*) Sect. 4; see *Lawrence v. Lawrence*, 26 Ch. D. 795.

(*s*) Sects. 6, 7; see *In re Cox's Trusts*, 9 Ch. D. 159.

There is also another kind of apportionment, as where the tenant under a lease has been evicted of part of the land out of which the rent issues, by a person having title paramount to that of the lessor; or where part of the land has been surrendered by the tenant to the lessor; or where the lessor has aliened the reversion as to part. In all these cases, the rent must be apportioned; and so much of it only shall be payable to the lessor, as corresponds with the value of what is still held by the tenant under him (*t*); though where the tenant has been tortiously expelled by the act of the landlord himself even from a part of the premises only, there shall be no apportionment, but the whole rent will be suspended so long as the expulsion continues (*u*). The doctrine of apportionment is not, it is to be remarked, confined to rent, but applies to other kinds of incorporeal hereditaments as well; for if a man, seised of forty acres of land, to which common of pasture is appurtenant, aliene five acres of the land to another, the alienee will be entitled to common *pro tanto*; that is, for all his commonable cattle *levant and couchant* on the five acres (*x*).

Having thus taken notice of such particular incorporeal hereditaments as appeared to be fit for the present to engage our attention, we shall now advert to some of the principal points of learning relative to this division of things real, considered generally, and without reference to the individual species of which they are composed.

In the first place, then, we may remark, that many incorporeal hereditaments are capable either of being annexed as an accessory to some hereditament corporeal, or of existing independently and *per se*; being described, in the former case, as *appendant* or *appurtenant*, in the latter,

(*t*) Co. Litt. 148 a; Bliss *v.* Collins, 5 Barn. & Ald. 876; Baynton *v.* Morgan, 21 Q. B. D. 101; and on app. 22 Q. B. D. 74.

(*u*) Gilb. Rents, 178.

(*x*) Wyat Wild's case, 8 Rep. 78 b.

as *in gross* (*y*). But to be connected as principal and accessory, things must be of a nature suitable to that relation, and therefore corporeal hereditaments cannot be appendant or appurtenant to such as are corporeal, nor incorporeal (generally speaking) to incorporeal (*z*). Where, however, the connection of principal and accessory exists, the effect is that the thing appendant or appurtenant will pass (without any particular mention of it) by any conveyance or alienation of the land to which it is annexed; and this whether the land be conveyed “with its appurtenances” or not (*a*). But if the principal be expressly conveyed without the accessory, or the accessory without the principal—as in some instances may be done—the accessory becomes thereafter, in either case, a thing in gross (*b*).

Incorporeal hereditaments are not, in any strict and proper sense, the subjects of *tenure*, like those of the corporeal kind (*c*); but they satisfy, in general, the legal description of *tenements*, and are expressly held to be within the meaning of that word as used in the statute *De donis*, so as to be capable of being *entailed*. And where an incorporeal hereditament is appendant or appurtenant, it will of course, in respect of the land to which it is annexed, be subject to all the rules of tenure.

The same *estates* also may be had in incorporeal as in corporeal hereditaments; and in many respects they are upon the same footing with regard to *title*, or the manner in which estates therein may be acquired or lost. More particularly we may notice, that though the former subjects of property are intangible in their nature, yet they are substantially in the same predicament with the

(*y*) Co. Litt. 121 b, 122 a.

(*z*) Ibid. n. (7); Plowd. 85, 168, 170; Capel v. Buszard, 6 Bing. 161.

(*a*) Co. Litt. ubi sup.; James v. Plant, 4 Ad. & El. 749.

(*b*) Plowd. 381; Com. Dig. Append. and Appurt. (D.); 2 Saund. 32.

(*c*) Co. Cop. 97; Co. Litt. 20 a; Bac. Ab. Tenure (A).

latter, even in regard to some of those laws of title which are founded upon an actual *seisin* or occupation. Thus with respect to *descent*, the rule of *seisina facit stipitem* had in general the same application to things incorporeal as to corporeal; that is, it governed all descents which took place on a death prior to the 1st of January, 1834—the date of the Inheritance Act (3 & 4 Will. IV. c. 106); for if a man who died before that day had what is *equivalent* to corporeal *seisin* in hereditaments that were incorporeal and in gross,—if, for example, in the case of a rent, he had obtained the actual receipt of it—such constructive *seisin* made him the root of descent with respect to these hereditaments, though he was not himself the purchaser (*d*),—a rule which was inapplicable, however, to dignities or titles of honour (*e*). And now upon successions since that Act, the rule which has been mentioned as to corporeal, obtains also as to incorporeal hereditaments, viz. that descent is in all cases to be traced from the purchaser (*f*). So, hereditaments of the latter as well as of the former description, fall within the doctrine of *special occupancy*; for though it seems that at common law there could be no title by *common* occupancy to things of which no corporeal or actual *seisin* could be had, yet the heir might have taken as *special* occupant (*g*); and incorporeal hereditaments are now expressly included in all the legislative provisions with respect to estates *pur autre vie*, which we had occasion to notice in a former part of the work (*h*).

On the other hand, in some important particulars, the law of title to incorporeal things differs from that which applies to things corporeal. For the former cannot in their nature pass by *feoffment*, this implying, as we have seen, an actual livery. But they have always been capable of passing by *grant* (*i*); and therefore they were

(*d*) Co. Litt. 15 b.

(*e*) Ratcliffe's case, 3 Rep. 42 a.

(*f*) 3 & 4 Will. 4, c. 106, ss. 1, 2.

(*g*) Bearpark v. Hutchinson, 7

Bing. 186.

(*h*) Vide sup. pp. 419 et seq.

(*i*) 2 Sand. Uses, 33, 36, 37.

said (like remainders and reversions of hereditaments corporeal) to *lie in grant*, and not *in livery*. And they would also pass by means of a surrender by deed (*k*); also, by any conveyance operating under the Statute of Uses; for existing incorporeal hereditaments may be limited by way of use, and will be executed by that statute accordingly (*l*); and by the 44 & 45 Vict. c. 41, s. 62, it has been provided that easements (together with certain other liberties) may be created even *de novo* by way of use. Nor is it by grant alone that title may be made to an incorporeal hereditament; for, first, rents may be created by *reservation* in a lease or other conveyance, as where a man seised in fee demises land to another for life or years, the latter yielding and paying for the same a certain sum of money (*m*). Again, there are certain incorporeal hereditaments which may be claimed by *custom*; as for all the inhabitants of a certain hamlet to have a right of way over a certain field for a particular purpose; but this species of title is subject to a very important restriction, viz. that no man can in this way claim a *profit à prendre* in the land of another (*n*); and accordingly, a custom for all the inhabitants of a certain hamlet to take from a private close, for the purpose of manure, sand drifted from the sea, is bad in law (*o*). Besides these titles, there is also the claim by *prescription*, which applies to almost every kind of hereditament incorporeal (*p*); and as well to those which are appendant or appurtenant, as to those which are in gross (*q*); but of course to incorporeal hereditaments only (*r*): and this last

(*k*) Co. Litt. 338 a.

(*l*) 2 Sand. Uses, pp. 33, 49, 59, 111.

(*m*) Bac. Ab. Rent, C.; Litt. s. 217; Wickham v. Hawker, 7 Mee. & W. 72.

(*n*) Gateward's case, 6 Co. Rep. 596; Chilton v. Corporation of London, 7 Ch. D. 735; Goodman v. Mayor of Saltash, 7 App. Ca.

733.

(*o*) Blewitt v. Tregonning, 1 Har. & W. 431.

(*p*) "*Prescriptio est titulus ex usu et tempore, substantiam capiens ab autoritate legis.*"—Co. Litt. 113 b.

(*q*) Wilkinson v. Proud, 11 Mee. & W. 35.

(*r*) Ibid.

species of title involves so many points of nicety, as to demand our more particular consideration.

The subject of prescription indeed has been in some measure unavoidably anticipated, in so far at least that it has been stated to be a title by long usage. But we are now to examine its nature more closely, and, as a preliminary point, we would remark, that though depending on usage, it is not to be confounded with custom. The distinction between custom on the one hand and prescription on the other hand, is this, that custom is properly a *local* usage, and prescription a *personal* one, attaching to a man and his ancestors, or to those whose estate he has (*s*). [As, for example, if there be a usage time out of mind in the parish of Dale, that all the inhabitants of that parish may dance on a certain close at all times for their recreation,—which is held to be a lawful usage,—this is strictly a custom, for it applies to the *place* in general, but not to any particular *person* (*t*): but if the tenant who is seised of the manor of Dale in fee alleges, that he and all those whose estate he hath in the said manor have used time out of mind to have common of pasture in such a close; this is properly called a prescription, for this is a usage annexed to the *person* of the owner of this estate.]

The subject of prescription has been newly regulated by the Prescription Act, 2 & 3 Will. IV. c. 71; but the provisions of this statute are of a nature by no means to supersede the former state of the law in regard to this species of title; and prescription will be best understood by contemplating it in two distinct points of view—first, as it exists at the common law; secondly, as it exists under the Prescription Act.

First, with respect to prescription at common law, the following points appear principally to deserve attention:
1. This title is always founded on the actual enjoyment of

(*s*) Co. Litt. 113 b; 2 Bl. Com. 263.

(*t*) Abbot v. Weekly, 1 Lev. 176;

Mounsey v. Ismay, 1 H. & C. 729;
Mayor of Saltash v. Goodman, 7 App. Ca. 633.

the thing in question; and a mere claim, however often repeated or long continued, and whether its validity has been questioned or not, will not suffice to establish a prescriptive right; moreover, the measure of the actual enjoyment is in general the measure of the right (*u*).

2. The enjoyment on which a prescription is founded, must have been constant and peaceable; for, as a general rule, when it has been subject to interruption or to dispute, no title by prescription arises. Yet where the right is shown to have once attached in consequence of an uniform and tranquil usage for a sufficiently long tract of time, a wrongful interruption of the enjoyment during a subsequent period of comparatively short duration (as for ten or twenty years) will not destroy the prescription (*x*).

3. As to the length of time sufficient to establish the right, the rule of the common law is, that there must have been a usage from time immemorial, or, as it is technically termed, from time whereof the memory of man is not to the contrary; which period (as before shown in our remarks upon *custom*) refers to so remote an era as the beginning of the reign of Richard the first (*y*). And therefore if the usage can be shown to have commenced at any time since that period, the prescription (where it is claimed at common law) is destroyed (*z*). But a commencement shown prior to the reign of Richard the first, would constitute no objection; for all time prior to that era is considered as out of the time of legal memory (*a*); also, supposing no evidence to be given as to the time at which the usage commenced, but that it appears, either by the testimony of living witnesses, or by other means of proof (*b*), that it has had con-

(*u*) *Manifold v. Pennington*, 4 Barn. & Cress. 161; *Jones v. Richards*, 6 Ad. & El. 532.

(*x*) Co. Litt. 114 b; 2 Inst. 653; Com. Dig. Prescription, E.; Brodie v. Mann, 10 App. Ca. 378.

(*y*) Co. Litt. 115 a.

(*z*) *Bryant v. Foot*, Law Rep., 3 Q. B. 497; *Mills v. Colchester*, *ibid.*, 3 C. P. 575.

(*a*) 9 Rep. 27 b; Com. Dig. Prescription, Pract. lib. ii. c. 22; Stark. Ev. 1205.

(*b*) Stark. Ev. 1217, 1st edit.; Co. Litt. 115 a.

tinuance for a period of *twenty years* or more, this will in general amount, at common law, to a presumption that it is immemorial,—so far, at least, as to sustain the prescription, supposing no circumstances of a contrary tendency to appear (*c*); and even proof of a shorter continuance than twenty years will have the same effect, if corroborated by other attendant circumstances indicative of the existence of an antient right (*d*). But the presumption of immemorial right, that would otherwise arise from an enjoyment of twenty years, or any other period within legal memory, will be defeated by showing that such enjoyment took place by virtue of a grant or licence from the party interested in opposing it, or that it was without his knowledge during the whole time that it was exercised (*e*).

4. Every prescription must be both certain and reasonable; therefore a prescription to pay for tithes one penny or *thereabouts* for every acre of arable land, or to take as much clay as shall be required for making bricks at a certain kiln out of another's field, is bad in law (*f*); and thus, too, a surplice fee claimed on marriage was held unsustainable, on the ground that, according to the value of money at the supposed origin of the prescriptive right, it was *excessive in amount* (*g*). 5. All prescription at common law must be laid either in a man and *those whose estate he hath* in certain lands (as in the example above given of a prescriptive common of pasture), which is called prescribing in a *que estate* (*h*), or it must be in a man *and his ancestors* (*i*). [And here this distinction is to be made—that if a man prescribes in a *que estate*, nothing is claimable by this prescription, but such things

(*c*) *Rex v. Joliffe*, 2 Barn. & Cress. 59; *Daniel v. North*, 11 East, 372; *Chad v. Tilsed*, 2 Brod. & Bing. 403.

(*d*) Stark. Ev. 1217, 1st ed.

(*e*) *Bright v. Walker*, 4 Tyr. 509.

(*f*) Com. Dig. Prescription, E. 3; *Hilton v. Granville*, 5 Q. B.

701.

(*g*) *Bryant v. Foot*, Law Rep., 3 Q. B. 497.

(*h*) *Padwick v. Knight*, 22 L. J., Exch. 198.

(*i*) *Mellor v. Spateman*, 1 Saund. 342.

[as are incident, appendant or appurtenant, to lands; for it would be absurd to claim anything as the consequence or appendix of an estate, with which the thing claimed has no connection; but if he prescribes in himself and his ancestors, he may prescribe for anything whatever that might be the subject of grant (*k*). And, formerly, a man might by the common law have prescribed for a right which had been enjoyed by his ancestors at any distance of time, though his or their enjoyment of it had been suspended for an indefinite series of years. But by the Statute of Limitations, 32 Hen. VIII. c. 2, it was enacted, that no person should make any prescription by the seisin or possession of his ancestor, unless such seisin or possession had been within threescore years next before such prescription made. 6. A prescription in a *que estate* must, also, always be laid in him that is tenant of the fee; and therefore a tenant for life, for years, or at will, or a copyholder, cannot prescribe, by reason of the imbecility of their estates (*l*); for as prescription is usage beyond time of memory, it is absurd that they should pretend to prescribe for anything, whose estates commenced within the remembrance of man; and therefore the tenant for life must prescribe under cover of the tenant in fee simple; *e. g.*, if tenant for life of a manor would prescribe for a right of common, as appurtenant to the same, he must allege that John Stiles was seised in fee of the manor; and that he, and all those whose estate he had, had immemorially used to have this right of common appurtenant to the said manor; and that John Stiles demised the said manor, with its appurtenances, to him the said tenant for life. 7. A prescription cannot lie for a thing which could not be raised by grant; for the law allows prescription only to supply the loss of a grant, and therefore every prescription presupposes a grant to have existed; *e. g.*, the lord of a manor cannot prescribe to raise a tax or toll upon strangers;

(*k*) Co. Litt. 121 a.(*l*) 4 Rep. 31, 32.

[for such claim could never have been good by grant, and it shall not be good by prescription (*m*). 8. Another rule is, that what is to arise by matter of record, cannot be prescribed for : such as, for instance, the right to forfeitures—being one of the franchises to which we before made brief allusion in the course of this chapter : for these forfeitures are found by the inquisition of a jury, and so made a matter of record : and prescription (which is a mere usage *in pais*) cannot extend to these (*n*). But certain franchises, *e. g.*, the franchises of treasure trove, waifs, estrays, and the like may be claimed by prescription ; for they arise from private contingencies, and not from any matter of record (*o*). 9. Lastly, a person having title to anything by prescription, is not to be considered as being himself the purchaser, so as to make it descendible to his heirs general, according to the ordinary rule of inheritance ; for prescription, inasmuch as it presupposes a grant, is in strictness rather to be considered as an evidence of a former acquisition, than as an acquisition *de novo* : but the rule on this subject is, that where a man prescribes for anything, (for example, a right of way,) in himself and his *ancestors*, it will descend only to the blood of that line of ancestors in whom he so prescribes : but if he prescribes for it in a *que estate*, it will follow the nature of that estate in which the prescription is laid, and be inheritable in the same manner, whether that were acquired by descent or purchase,—for every accessory followeth the nature of its principal.] And note, that a right arising in one or more persons by prescription may (and frequently does) give rise to a prescriptive liability in another or others, *e. g.*, the liability attaching by prescription to the sea-frontagers in Essex, to repair the sea-walls there (*p*).

(*m*) Potter *v.* North, 1 Vent. 387.

(*o*) Co. Litt. 114 b.

(*n*) 2 Bl. Com. 265 ; Co. Litt. 114 a ; Case of Abbot of Strata Marcella, 9 Rep. 24 a.

(*p*) The Queen *v.* Commissioners of Sewers for Essex, 14 Q. B. D. 561.

Such being the nature of prescription at common law, we are next to regard it as regulated *by statute*, viz., by the Prescription Act, 2 & 3 Will. IV. c. 71,—a subject which the explanations that have been already given will enable us more easily to apprehend. This statute is described in its title as an Act “for shortening the time of prescription in certain cases,” and originated in a reasonable dissatisfaction with the rule, which required an enjoyment from “time immemorial” as the indispensable foundation in every case of a prescriptive right. The effect of that rule (we have seen) was, that while, in general, an enjoyment for even *twenty* years sufficed to sustain a claim by prescription, because it constituted a presumption of immemorial antiquity, yet—if accident should supply the adverse party with the means of proving that, at any period subsequent to the commencement of the reign of Richard the first, the alleged right did not in fact exist—the claimant would have been defeated, even though he could prove that the usage had lasted for centuries. To obviate the injustice and inconvenience resulting from this doctrine, the Act in question was passed; and its general object is to dispense (in all the ordinary cases of prescription) with the necessity of making out an immemorial usage, either by presumption or otherwise; and to allow an enjoyment for a certain definite period to constitute a right.

In pursuance of this object, the Prescription Act, 2 & 3 Will. IV. c. 71, provides, with respect to rights of common “and all other profits or benefits to be taken and enjoyed “from or upon any land”—with the exception, however, of tithes, rents and services, which it leaves as at common law,—that where there shall have been an enjoyment of them by any person claiming right thereto (*q*), without

(*q*) *Kinloch v. Nevile*, 6 Mee. & W. 795; *Earl de la Warr v. Miles*, 17 Ch. D. 535.

interruption (*r*), for *thirty* years (*s*) next before the commencement of any action upon the subject (*t*), the prescriptive claim shall no longer be defeated (as it would have been before the Act), by showing only that the enjoyment commenced at a period subsequent to the era of legal memory; but the claim may be defeated in any other way in which it was defeasible before the statute passed (*u*); so that, *e. g.*, a case of thirty years' enjoyment would still be satisfactorily answered, by showing that it was without the knowledge of the adverse party, or that it was by his mere licence or permission, either of which circumstances would, before the statute, have rebutted the presumptive right (*x*); but nothing is to be deemed an interruption of the right unless it shall have been submitted to or acquiesced in for the space of one year (*y*); and a mere cessation of the enjoyment is neither an interruption nor a discontinuance of the right (*z*). The Act also provides, that the time during which the adverse party shall have been an infant, idiot, non compos mentis, feme coverte, or tenant for life, or during which any action as to the claim shall have been pending and diligently prosecuted,—shall be excluded in the computation of this period of thirty years (*a*); but where there has been an enjoyment for as much as *sixty* years, the claim is to be absolute and indefeasible, except only where proof can be brought forward that such enjoyment took place under some consent or agreement *in writing*, expressly given for the purpose. And in addition to these regulations as to the

(*r*) *Eaton v. Swansea Waterworks Company*, 20 L. J., Q. B. (N. S.) 482; *Carr v. Foster*, 3 Q. B. 581.

(*s*) *Richards v. Fry*, 7 Ad. & El. 698; *Wright v. Williams*, Tyr. & Gr. 375.

(*t*) *Bailey v. Appleyard*, 8 Ad. & El. 161, 778; *Ward v. Robins*, 15 Mee. & W. 237.

(*u*) *Mill v. New Forest Commis-*

sioners, 18 C. B. 60; *Seddon v. Bank of Bolton*, 19 Ch. D. 462.

(*x*) *Bright v. Walker*, 4 Tyr. 509; *Kinloch v. Nevile*, 6 Mee. & W. 795.

(*y*) 2 & 3 Will. IV. c. 71, s. 4.

(*z*) *Hollins v. Verney*, 11 Q. B. D. 715; 13 Q. B. D. 304.

(*a*) 2 & 3 Will. 4, c. 71, s. 7; *Pye v. Mumford*, 11 Q. B. 666.

time for a prescription, there are others as to the manner of making it, and among them the following,—that he who prescribes under the Act shall not be required in any case to claim as in right of the owner of the fee (*b*); and as regards *time*, it is to be particularly noted, that no time falling short of the full time prescribed by the Act raises any presumption of right under the Act, although such time would be a valuable element in making out a prescriptive title by the common law.

In addition to these enactments with regard to prescriptive rights of common and the like, the statute makes similar provisions with regard to another class of incorporeal hereditaments, viz. as to any “way or other easement (*c*), or any watercourse, or the use of any water, to “be enjoyed upon, over, or from any land or water” (*d*), “and also as to the access or use of light to and for any “dwelling-house, workshop, or other building” (*e*). But the periods conferring a prescriptive right in the case of ways or other easements, and waters, are *twenty* and *forty* years, in lieu of thirty and sixty years respectively; but when the land or water as against which the claim is made has been held for term of life or exceeding three years, such term is to be excluded from the computation of the forty years, in the event of the person who may be entitled in reversion resisting the claim within three years after the term determines (*f*); while as regards lights, the uninterrupted enjoyment of these for *twenty* years, constitutes an absolute and indefeasible right to them, any local usage or custom to the contrary notwithstanding (*g*); but,

(*b*) Sect. 5; *Earl de la Warr v. Miles*, 17 Ch. D. 535.

(*c*) *Battishill v. Reed*, 18 C. B. 696; *Webb v. Bird*, 13 C. B. N. S. 841; *Angus v. Dalton*, 6 App. Ca. 740.

(*d*) *Murgatroyd v. Robinson*, 7 Ell. & Bl. 391.

(*e*) *Wheeldon v. Burrows*, 12 Ch. Div. 31; *Russell v. Watts*, 10 App. Ca. 590.

(*f*) 2 & 3 Will. 4, c. 71, s. 8; *Symons v. Leaker*, 15 Q. B. D. 629.

(*g*) *Truscott v. Merchant Taylors' Company*, 11 Exch. 855; *Glover v. Coleman*, Law Rep., 10 C. P. 108.

of course, even as regards lights, the claim may be defeated by showing that the enjoyment took place under some agreement in writing (*h*).

Besides those which have been above noticed, there still remains another point of title appropriate to incorporeal as distinguished from corporeal hereditaments; viz. that the former are capable of *extinction*, in a manner peculiar to themselves. Thus, they may be extinguished by *release* (*i*); as when a person entitled to common, releases it to the owner of the soil over which it is claimed; and common may even be released in part (*k*). Also, after a disuse for twenty years, a release will in general be presumed (*l*). Incorporeal hereditaments may also be extinguished by *unity of seisin*; as where the person entitled to a way or common becomes seised in fee, by purchase or otherwise, of the land which is subject to the right; for the dominion of the soil itself, and of an incorporeal right relating to the same soil, cannot in general subsist together in the same individual; because as soon as they are combined in his person, the latter right, being merely of a particular and subordinate kind, is absorbed and extinguished in the superior title of general ownership (*m*); but to this rule, franchises are an exception; for these, as before remarked, are of a nature *collateral* to the inheritance itself, and are consequently not affected by any unity of seisin (*n*); but franchises also may, in certain cases, be extinguished, *e.g.*, by a re-union with the Crown, from which they emanated, or by forfeiture for *misuser*, or for *nonuser* (*o*). Lastly, we may remark as to some particular species of incorporeal

(*h*) 2 & 3 Will. 4, c. 71, s. 5; Ca. 177.

Seddon *v.* Bank of Bolton, 19 Ch. D. 462.

(*i*) Co. Litt. 270 a, 280 a; Lovell *v.* Smith, 3 C. B. (N. S.) 127.

(*k*) Benson *v.* Chester, 8 T. R. 401.

(*l*) Ward *v.* Ward, 7 Exch. 838; Cook *v.* Bath, Law Rep., 6 Eq.

(*m*) 4 Rep. 38 a; Cro. Eliz. 570; Winship *v.* Hudspeth, 10 Exch. 5; Barkshire *v.* Grubb, 18 Ch. Div. 616.

(*n*) 4 Inst. 318.

(*o*) 3 Cruise, Dig. 302; Northumberland (Duke) *v.* Houghton, L. R., 5 Exch. 137.

hereditaments, viz. *lights* and *watercourses*, that, as they are acquired by mere occupancy, they are in like manner capable of being extinguished after their acquisition, by a simple act of abandonment; that is, by the mere discontinuance of the enjoyment, though for a period short of twenty years: provided, however, that the abandonment be absolute,—for if it take place under circumstances which imply the intention of future resumption within a reasonable time, the right in that case will not be lost (*p*).

(*p*) *Liggins v. Inge*, 7 Bing. 692; *Stokoë v. Singers*, 8 Ell. & Bl. 31.

CHAPTER XXIV.

THE CONVEYANCING AND LAND ACTS OF 1881—1892.



THE statutes relating to the practice of conveyancing and to dealings with land generally, which have been passed in and subsequently to the year 1881, and principally the Conveyancing Acts, 1881, 1882, and 1892, and the Settled Land Acts, 1882—1890, are of an importance so general and far-reaching as to demand, and their provisions are of a character so specific as to necessitate, a more particular treatment than they have yet received in this treatise; and we shall accordingly give them a chapter to themselves, in which their various provisions, and incidentally the provisions of the Vendor and Purchaser Act, 1874, and some few provisions of an incidental character contained in other statutes, shall be expounded.

Firstly. By the Conveyancing Act, 1881 (*a*), it has been provided as follows:

That the word “heirs,” or the phrase “heirs of the body,” shall no longer be necessary in a *deed* as the words of limitation respectively for a fee simple, and a fee-tail estate; but it shall be sufficient in such deed to say that the estate is in fee simple, or in fee tail, as the case may be; and if in fee tail, that it is in fee-tail male or in fee-tail female, or in fee-tail simply if the estate intended to be conferred is in fee-tail general (*b*).

(*a*) 44 & 45 Vict. c. 41.

(*b*) Sect. 51.

That freehold land (also choses in action) may be conveyed by one [or more] person [or persons] to himself [or themselves] jointly with another person [or other persons], in like manner as it might be conveyed (that is to say, directly and without any grantee to uses) to another person; also, that a husband may in like manner convey direct to his wife, or a wife to her husband, and in either case either alone or jointly with any other person [or persons] (*c*).

That the word “grant” need not be used in any conveyance (*d*); that in every conveyance the “estate clause” shall be implied, so that it is no longer necessary in any case to specify “all the estate, right, title, interest, claim, and demand” of the conveying party (*e*); also, in every conveyance the “general words” shall be implied, so that the old enumeration of “buildings, erections, ... hedges, fences, ... fixtures, ... sewers, gutters, drains privileges, easements, rights, and advantages whatsoever,” need no longer be inserted in the conveyance, but the appropriate general words will in each case be implied, according as it is land simply that is being conveyed, or is land built upon, or is a manor (*f*), and yet, not so as to give to the conveyance any greater force or effect than if the estate clause and the appropriate general words were expressed therein.

That as regards the covenants theretofore usually inserted in purchase and in mortgage deeds of freehold and of leasehold land, these covenants shall be implied,—in each instance the covenants thereto appropriate,—provided that the conveyance is expressed to be made by the vendor or mortgagor (as the case may be) in the capacity in which he conveys, that is to say,—

If the legal and beneficial owner is the conveying party, then it must be expressed that he conveys

(*c*) Sect. 50.

(*d*) Sect. 49.

(*e*) Sect. 63.

(*f*) Sect. 6.

as “beneficial owner”; and in that case, if the deed is a purchase-deed of freehold lands, the limited covenants for title are implied; and if the deed is a mortgage deed of freehold lands, the absolute covenants for title are implied, according to the distinction above explained (*g*), between the covenants given by a vendor and by a mortgagor respectively. And if the deed is a deed conveying leaseholds, then in addition to the covenants for title above referred to, there shall be implied, by force of the words “beneficial owner,” the following further covenant and covenants, that is to say,—

If the deed is a purchase-deed, the usual limited covenant that the lease is valid, and that all rents, covenants, conditions, and agreements have been duly paid and performed up to the date of the conveyance; and

If the deed is a mortgage deed, the usual absolute covenants, firstly, that the lease is valid, and that all rents and covenants, &c. have been duly paid and performed up to the date of the conveyance; and secondly, that the mortgagor will, during the continuance of the security continue to pay the rents and to observe and perform the covenants, conditions, and agreements reserved by and contained in the lease (*h*).

If the conveying party is not the legal and beneficial owner, but is only a trustee or mortgagee, or a legal personal representative or the like, then it must be expressed in the conveyance that he conveys as “trustee” or “mortgagee,” or otherwise as the case may be; and thereupon, and by force of such express description of his capacity, the usual (and very limited) covenant is implied

(*g*) *Supra*, p. 462.

(*h*) Sect. 7.

that he, the conveying party, has not encumbered; and

If the conveying party, although both legal and beneficial owner, is conveying by way of settlement only, and in the conveyance he is expressed to convey as “settlor,” then, and by force of such express description of his capacity, the usual (and very limited) covenant is implied that he will make all (if any) necessary further assurance of the premises (*i*).

But it is to be observed that the capacity in which the conveying party conveys must be expressed; for otherwise no covenant will be implied (*k*); and note, that the benefit of all these implied covenants runs with the land (*l*); and note also, that where any incumbrance or the like appears on the face of the conveyance, the implied covenant must be guarded in some way against extending to such incumbrance (*m*).

That as regards the covenant for production of deeds and for their safe custody in the meanwhile, which was usually inserted in purchase-deeds, where the vendor retained the deeds or any specified deeds, in lieu of that covenant (which used to run to a great although unavoidable length) it shall be sufficient in future to merely insert in the purchase-deed,—

An acknowledgment of the right of the purchaser to their production; and

An undertaking for their safe custody (*n*).

As regards mortgage deeds, if the deed is expressed to be made by way of statutory mortgage, there shall be implied (*o*)—

A covenant to repay the principal and interest of the mortgage debt on the day therein specified, and

(*i*) Sect. 7, E.

(*k*) Sect. 7, sub-s. 4.

(*l*) Sect. 7, sub-s. 6; and *supra*,
p. 462.

(*m*) Page *v.* Midland Ry. Co.,
(1894) 1 Ch. 11.

(*n*) Sect. 9.

(*o*) Sect. 26.

to pay interest half-yearly thereafter upon the principal remaining unpaid; and

The usual proviso for reconveyance on the full discharge of the mortgage debt.

Also, whether the mortgage deed is expressed or is not expressed to be made by way of statutory mortgage, there shall be implied (*p*)—

A power of sale in the mortgagee;

A power in him to insure;

A power in him to appoint a receiver; and

A power in him (when in possession) to cut and sell timber ripe for cutting.

But as regards the mortgagee's power of sale, it is not to be exerciseable by him unless one or other of the three events specified in the 20th section of the Act have arisen; but should he duly exercise that power, then he may give receipts for the purchase-money (*q*); also, generally he may apply in the mode and modes heretofore usual, and without any express powers in that behalf, all moneys received by him under the sale, or from the insurance, or the cutting of timber or otherwise (*r*).

As regards property in mortgage, the mortgagee (when in possession) may, without the concurrence of the mortgagor, and the mortgagor (while in possession) may, without the concurrence of the mortgagee (*s*), exercise the following leasing powers, that is to say,—

May make an agricultural or occupation lease for any term not exceeding twenty-one years, to take effect in possession within one year from its date; and

May make a repairing or a building lease for any term not exceeding ninety-nine years,—

the best rent obtainable being in every case reserved, and no fine, premium, or foregift being taken, although in the

(*p*) Sect. 19.

(*q*) Sect. 22.

(*r*) Sects. 22—24.

(*s*) Sect. 18.

case of a building or repairing lease, the rent during the first five years of the term may be nominal; and the mortgagor (when he is the lessor) must deliver a counterpart of the lease to the mortgagee; unless, *semble*, he executes a duplicate.

As regards contracts for sale and the abstract of title to the property sold, the Conveyancing Act, 1881 (*t*), in extension of the Vendor and Purchaser Act, 1874 (*u*), makes many useful provisions calculated to save the vendor expense; and by the combined effect of the two Acts, the law now prevailing as to such contracts and abstracts may be stated as follows:—

That forty years, and not sixty years, shall be the length of the abstract (*x*).

Under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold (*y*).

Under a contract to sell and assign an existing term of years derived out of a leasehold interest in land (*z*), or under a contract to grant a lease for years, *i.e.*, a new term of years, to be derived out of a leasehold interest in land (*a*), the intended assign or lessee shall not have the right to call for the title to the leasehold reversion.

Where land of copyhold or customary tenure has been converted into freehold by enfranchisement, then under a contract to sell and convey the freehold, the purchaser shall not have the right to call for the title to make the enfranchisement (*b*).

Where land sold is held by lease (not including under-

(*t*) Sect. 3.

(*u*) 37 & 38 Vict. c. 78, s. 2.

(*x*) Act, 1874, s. 1.

(*y*) Ibid. s. 2.

(*z*) Act, 1881, s. 3, sub-s. 1.

(*a*) Ibid. s. 13.

(*b*) Ibid. s. 3, sub-s. 2.

lease), the purchaser shall assume, unless the contrary appears, that the lease was duly granted; and on production of the receipt for the last rent (not being a mere peppercorn rent) (*c*) due under the lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion of the purchase (*d*).

Where land sold is held by underlease, the purchaser shall assume, unless the contrary appears, that the underlease and every superior lease were duly granted; and on production of the receipt for the last rent (not being a peppercorn rent) due under the underlease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the underlease have been duly performed and observed up to the date of actual completion of the purchase; and further, that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date (*e*).

Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions (*f*).

(*c*) In *re Moody and Yates'*
Contract, 28 Ch. D. 661; 30 Ch.
D. 344.

(*d*) Act, 1881, s. 3, sub-s. 4.

(*e*) Act, 1881, s. 3, sub-s. 5;
Lawrie v. Lees, 7 App. Ca. 19.

(*f*) Act, 1874, s. 2.

Preliminary contracts for leases need not be abstracted at all (*g*) ; and a purchaser of any property shall not require the production or any abstract or copy of any deed, will, or other document, dated or made before the time prescribed by law or stipulated for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser ; nor shall he require any information, or make any requisition, objection, or inquiry with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title is recited, covenanted to be produced, or noticed ; and he shall assume, unless the contrary appears, that the recitals contained in the abstracted instruments of any deed, will, or other document forming part of that prior title are correct, and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by fine, recovery, acknowledgment, enrolment, or otherwise (*h*).

On a sale of any property, the expenses of the production and inspection of all Acts of Parliament, inclosure awards, records, proceedings of courts, court rolls, deeds, wills, probates, letters of administration, and other documents not in the vendor's possession, and the expenses of all journeys incidental to such production or inspection, and the expenses of searching for, procuring, making, verifying, and producing all

(*g*) Act, 1882, s. 4 ; also Settled Land Act, 1882, s. 31, sub-s. 4.

(*h*) Act, 1881, s. 3, sub-s. 3.

certificates, declarations, evidences, and information not in the vendor's possession, and all attested, stamped, office, or other copies or abstracts of, or extracts from, any Acts of Parliament, or other documents aforesaid not in the vendor's possession, if any such production, inspection, journey, search, procuring, making, or verifying is required by a purchaser, either for verification of the abstract or for any other purpose, shall be borne by the purchaser who requires the same; and where the vendor retains possession of any document the expenses of making any copy thereof, attested or unattested, which a purchaser requires to be delivered to him, shall be borne by that purchaser (*i*).

On a sale of any property in lots, a purchaser of two or more lots, held wholly or partly under the same title, shall not have a right to more than one abstract of the common title, except at his own expense (*k*).

The inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title shall not be an objection to title in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents (*l*).

Such covenants for production as the purchaser can and shall require shall be furnished at his expense, and the vendor shall bear the expense only of the perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser (*m*).

Where the vendor retains any part of an estate to

(*i*) Act, 1881, sub-s. 6; Johnson
v. Tustin, 28 Ch. Div. 84; 30 Ch.
Div. 42.

(*k*) Act, 1881, sub-s. 7. °

(*l*) Act, 1874, s. 2.

(*m*) Ibid.

which any documents of title relate, he shall be entitled to retain such documents (*n*).

As regards the conveyance of the property sold, and the parties to such conveyance, and the completion generally of the purchase, the provisions are as follows:—

The vendor entitled legally and beneficially will of course convey; and in case of his death, his personal representatives may (in lieu of his heir or devisee) do so (*o*).

Any legal estate outstanding in any trustee or mortgagee will be conveyed by him; and in case of his death, his personal representative shall (in lieu of his heir or devisee) do so (*p*), provided the land be of freehold tenure, but not now if the land be of copyhold tenure (*q*): also if the trustee being a bare trustee be a married woman, then he (*scil.* she) may convey it as if she were a *feme sole* (*r*),—a provision which by the Married Women's Property Act, 1882 (*s*), appears, *semble*, to be now applicable to all married women who are trustees, at least when they have become trustees since the 31st December, 1882.

When the property sold is subject to any incumbrance, and the incumbrancer either cannot or will not concur to release his charge, the court will in a proper case make an order discharging the land, and substituting some other adequate security, and this whether the incumbrancer assents or not (*t*).

When the property sold is subject to any quit rent, chief rent, rent-charge, or other perpetual annual

(*n*) Act, 1874, s. 2.

(*o*) Act, 1881, s. 4.

(*p*) Ibid. s. 30.

(*q*) 57 & 58 Vict. c. 46, s. 88, repeating the 50 & 51 Vict. c. 73, s. 45; In re Mills, 37 Ch. D. 312;

40 Ch. Div. 14.

(*r*) Act, 1874, s. 6, as continued by 56 & 57 Vict. c. 53, s. 16.

(*s*) 45 & 46 Vict. c. 75.

(*t*) Act, 1881, s. 5.

sum, not being rent reserved in lieu of any purchase money, it may be discharged therefrom, upon certificate of the Board of Agriculture (Copyhold Department) specifying the redemption value thereof, and upon payment or tender of that amount, and upon a further certificate of the Board, such further certificate certifying *simpliciter* that the rent in question is redeemed (*u*).

The conveyance need not be executed by the vendor in the presence of the purchaser, but (if the purchaser requires it) the execution by the vendor must be attested by a nominee of the purchaser (*x*).

A receipt for the purchase-money may be embodied in the purchase-deed, and will be sufficient without any receipt for same being endorsed on that deed (*y*) ; and such receipt, whether in the body or on the back of the deed, shall be conclusive evidence of the fact, excepting as between the parties and their privies (*z*).

When the purchase-deed contains such receipt, either in the body or on the back thereof, the purchaser may pay his purchase-money to the vendor's solicitor producing the purchase deed duly executed (*a*) ; and by reason of the Trustee Act, 1888 (*b*), altering the former law in this respect (*c*), the purchase-money might in such a case be so paid, notwithstanding that the vendor might be in fact a trustee, a provision which has been re-enacted by the Trustee Act, 1893 (*d*).

And the Conveyancing Act, 1881 (*e*), provides gene-

(*u*) Act, 1881, s. 45.

(*x*) Ibid. s. 8.

(*y*) Ibid. s. 54.

(*z*) Ibid. s. 55.

(*a*) Ibid. s. 56.

(*b*) 51 & 52 Vict. c. 59, s. 2.

(*c*) Re Bellamy and Metropolitan Board of Works, 24 Ch. D. 387 ;
Re Flower and Metropolitan Board of Works, 27 Ch. D. 592.

(*d*) 56 & 57 Vict. c. 53, s. 17.

(*e*) Sect. 70 ; In re Hall-Dare's Contract, 21 Ch. Div. 41.

rally, in favour of a purchaser (lessee or mortgagee) or intending purchaser (lessee or mortgagee), that any order of the Chancery Division under any statutory or other jurisdiction shall (in effect) be a full protection to the purchaser purchasing under or upon the faith of such order; and the Conveyancing Act, 1882 (*f*), in order to further assure the purchaser, once his purchase is completed, provides that if he obtain an official certificate of the result of searches for judgments, deeds, &c., &c., required to be registered or enrolled, he shall be thereby absolutely protected against everything of that sort not appearing on such certificate, and shall not be affected by notice of anything whatsoever prejudicial to his title, unless he have actual notice thereof, or such constructive notice as in the Act expressed.

As regards rent-charges created by deed or will, and with a view to shortening the documents creating same, it has been provided (*g*) that, without any express provision in the deed or will to that effect, the person entitled to the rent-charge (or other annual sum not being ordinary rent service) issuing out of or charged upon lands or the income thereof, shall have the following remedies for the recovery thereof, that is to say,—(1) in case the rent remains unpaid for twenty-one days, a power to distrain therefor like a landlord for rent due on an ordinary lease; and (2) in case the rent remains unpaid for forty days, a power to either enter upon and receive the rents and profits of the land until payment, or (with or without entry upon) to demise the land to a trustee upon trust by sale, mortgage, or otherwise to raise the arrears of rent and all expenses.

As regards leases, the Conveyancing Act, 1881, in addition to providing for the grant thereof, and for the

(*f*) Sects. 2, 3; *Bailey v. Barnes*, (1894) 1 Ch. 25. (*g*) Act, 1881, s. 44.

assignment (on the sale) thereof as hereinbefore expressed, provides also for the maintenance of the lease and for the restoration thereof as follows, that is to say,—

As regards the maintenance of the lease, it provides :—
 Firstly, as regards the right of the lessor and the duties of the lessee (*h*) : That rent reserved by a lease, and the benefit of every covenant or provision on the lessee's part therein contained, having reference to the subject-matter thereof, and of every condition of re-entry therein contained, shall be annexed to and go with the reversion immediately expectant on the lease, and this notwithstanding the severance of that reversion. Secondly, as regards the rights of the lessee and the duties of the lessor (*i*) : That the obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversion immediately expectant on the lease, be annexed to and go with that reversion, and this notwithstanding the severance of that reversion. And Thirdly, as regards conditions of re-entry and other conditions, when either the reversion upon a lease is severed or the lease itself as to part of the hereditaments thereby demised is determined (*k*),—that notwithstanding the severance of the reversion or the cesser of the term as to part of the land, every condition of re-entry, or other condition, shall be apportioned, and remain annexed to the several parts of the reversion, and be in force, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, had alone originally been comprised in the lease.

And as regards the restoration of the lease (which phrase now extends to an underlease and to agreements for leases or underleases which are specifically enforceable by the intended lessees (*l*), and also to a fee-farm demise), and for

(*h*) Sect. 10.

(*i*) Sect. 11.

(*k*) Sect. 12 ; 22 & 23 Vict. c. 35,

s. 3.

(*l*) 55 & 56 Vict. c. 13, s. 5.

relieving against any forfeiture thereof, being a forfeiture accruing otherwise than for breach of a covenant or condition against assigning or underleasing, or for bankruptcy, or for suffering an execution, or for breach (in the case of a mining lease) of the covenant for inspection, the Act provides (*m*) as follows:—That the right of re-entry for the forfeiture shall not be enforceable by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and requiring the lessee to remedy the breach if and so far as remediable and otherwise requiring him to make compensation in money for the breach; and the lessee has a reasonable time thereafter to remedy the breach, or to make compensation to the lessor for the breach. And where a lessor is proceeding by action or otherwise to enforce the forfeiture, the lessee may in the lessor's action, or provided the lessor shall not yet have actually entered for the forfeiture (*n*), the lessee may in any action brought by himself, apply to the court for relief; and the court may in its discretion grant or refuse the relief, on such terms as to costs, expenses, damages, compensation, penalty, or otherwise, as the circumstances of the case may require,—the lessee paying in all cases the lessor's expenses including his valuer or surveyor's charges (*o*); and these provisions for the relief of lessees against the forfeiture of their own leases have been (in substance) made applicable also to their relief against the loss of their leases through or consequent upon the forfeiture of the superior lease (if any) (*p*). Also forfeiture on the ground of the bankruptcy of the lessee, or on the ground of an execution levied, is now made relievable under the Act, provided the lease be sold within a year from the bankruptcy or execution (*q*); and lessors are no longer able

(*m*) Sect. 14; *Quilter v. Mapleson*, 9 Q. B. D. 672.

(*n*) *Roger Cholmeley's School v. Sewell*, (1893) 2 Q. B. 254.

(*o*) 55 & 56 Vict. c. 13, s. 2.

(*p*) *Ibid.* s. 4.

(*q*) *Ibid.* s. 2, sub-s. 2.

to obtain any profit to themselves in giving licences to assign (*r*).

As regards infants, and the management of their estates, and their maintenance, the Act, with a view principally to shortening the forms in settlements and wills, provides as follows:—That an infant's fee-simple estate or his leasehold term shall be deemed a settled estate within the meaning of the Settled Estates Act, 1877, so as to introduce all the powers of sale and of leasing conferred by that Act upon tenants for life (*s*). And that during the infancy (if a male), or infancy and coverture (if a female), the trustees appointed for this purpose by the settlement (if any), or if there are none so appointed, then the persons (if any) who are for the time being under the settlement trustees with power of sale of the settled land, or any part thereof, or with power of consent to or approval of the exercise of such a power of sale, or if there are none, then any persons appointed as trustees for this purpose by the court, on the application of a guardian or next friend of the infant, may enter into and continue in possession of the land, and exercise the following powers (*t*), that is to say:—(1) Manage or superintend the management of the land, with power to fell timber or cut underwood in the usual course; and with power to rebuild, and repair houses and other buildings, and to continue the working of mines, and to drain or otherwise improve the land, and to insure against loss by fire, and to make allowances to and arrangements with tenants and others, and to determine tenancies and to accept surrenders and the like,—the trustees being (in their management) subject to (but subject only to) the same restrictions as the infant, if of full age, would be subject to (*u*); and (2) Out of the income of the land,

(*r*) 55 & 56 Vict. c. 13, s. 3.

22 Ch. Div. 521; *Welch v. Channell*,

(*s*) 44 & 45 Vict. c. 41, s. 41.

26 Ch. Div. 58, 63.

(*t*) Sect. 42; *Jackson v. Talbot*,

(*u*) Sect. 42, sub-s. 2.

21 Ch. Div. 786; *Wilson v. Turner*,

including the produce of the sale of timber and underwood, pay the expenses incurred in the management, and all outgoings not properly payable by any other person, and the interest on mortgage debts (*x*); and (3) Apply at discretion any income for the infant's maintenance, education, or benefit, or pay thereout any money to the infant's parent or guardian to be applied for the same purposes (*y*); and the Act expressly provides that the trustees shall duly invest the residue of the income and accumulate the income of the investments in the way of compound interest, and stand possessed of the accumulated fund (without prejudice to their right to apply such fund as if the same were income of the current year) (*z*), on the trusts following (namely): Firstly, If the infant attains the age of twenty-one years, then in trust for the infant; or if the infant being a female marries while an infant, then in trust for the infant for her separate use; but Secondly, If the infant dies while an infant and, being a female, without having been married, then (subject to any settlement affecting the fund or the land from which the income has arisen) in trust for the infant's personal representatives as part of the infant's personal estate; and otherwise according as the settlement shall provide.

The Act also further provides (*a*), that where any property is held by trustees in trust for an infant, either for life or for any greater interest, and whether absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age (*b*), the trustees may at their sole discretion pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property or any part thereof, whether

(*x*) Sect. 42, sub-s. 3.

(*y*) Ibid. sub-s. 4.

(*z*) Sect. 42, sub-s. 5.

(*a*) Sect. 43. See *Judkins' Trusts*,
25 Ch. Div. 743; *Thatcher's Trusts*,

26 Ch. Div. 426.

(*b*) In *re Jeffery*, (1891) 1 Ch.
671; In *re Burton's Will*, (1892) 2
Ch. 38; In *re Holford*, (1894) 3
Ch. 30.

there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education or not; and the trustees are to accumulate the residue at compound interest, and to hold these accumulations (without prejudice to their right to apply them as income of the current year) for the benefit of the person who ultimately becomes entitled to the property from which the same arise (*c*).

(*c*) The provisions of the Conveyancing Act, 1882, are of a character purely incidental to those of the Conveyancing Act, 1881, and such of them as require special notice in the text of this treatise have been incorporated in the statement hereinbefore given of the provisions of the last-mentioned Act. These two Acts contain, also, some provisions of great importance, but which are too special to be referred to in the text. Of these more special provisions, the Conveyancing Act, 1881, contains the following:—The duty of the mortgagee to transfer instead of re-conveying (s. 15); his duty to permit the mortgagor to inspect his title-deeds (s. 16); the abolition of the consolidation of mortgages (s. 17); the sale of mortgaged estates on interlocutory order in the Chancery Division (s. 25); the divers provisions (ss. 31—38) relative to the appointment of new trustees and the retirement of the old trustees and the vesting of the trust property and the powers of trustees, which have now been repealed and re-enacted by the Trustee Act, 1893; and the execution by married women of powers of attorney (s. 40); and the execution of powers of attorney generally (ss. 46—48); and

the Conveyancing Act, 1882, contains the following:—The duty of the mortgagee to transfer instead of re-conveying, and to whom (s. 12); the execution and duration of powers of attorney generally (ss. 8, 9); and the provision (s. 5) relative to separate sets of trustees which was afterwards amended (Conveyancing Act, 1890, s. 6), but which, with the amendment, has now been repealed and re-enacted by the Trustee Act, 1893. Some other minor points in the Acts have also been incidentally dealt with already in a sufficient manner in the earlier portions of this volume, viz., the following:—the release and disclaimer of powers (Conveyancing Act, 1881, s. 52; Conveyancing Act, 1882, s. 6); the acknowledgment of deeds by married women (Conveyancing Act, 1882, s. 7); the restriction on executory interests (Conveyancing Act, 1882, s. 10); the enlargement of long terms of years into fee simple estates (Conveyancing Act, 1881, s. 65, and Conveyancing Act, 1882, s. 11); and the removal of the restraint of anticipation in the case of the separate estates of married women (Conveyancing Act, 1881, s. 39).

Secondly, by the Settled Land Act, 1882 (*d*), it has been provided as follows :—

That “settled land” shall be land subject to a settlement, the state of facts when the settlement took effect being regarded; and that “settlement” shall be any deed, will, or other instrument, or number of instruments, whether dated before or after, or partly before and partly after, the 1st day of January, 1883 (the date of the commencement of the Act), under which land stands limited to persons in succession, a remainder or reversion not disposed of by the settlement, being for the purposes of the Act deemed to be an estate under the settlement (*e*). Also, the land to which an infant is entitled in fee simple, or for other the whole estate, is settled land (*f*).

That the tenant for life under the settlement shall have the powers in and by the Act expressly given to him; and the phrase “tenant for life” is to include for this purpose not merely the person entitled beneficially for his life (whether subject to any incumbrance or not) to the possession or to the receipt of the rents and profits of the land, but also two or more persons entitled as cotenants for life to such possession or receipt (*g*), and also the following persons, that is to say, persons entitled to a fee-simple defeasible, to a base fee, to an estate for years (not being a lease at a rent) determinable with life, to an estate *pur autre vie*, to a defeasible life estate, or *pur autre vie* estate, to an estate by the curtesy, to an estate tail generally (whether the reversion thereon is in the Crown

(*d*) 45 & 46 Vict. c. 38, amended by the Settled Land Act, 1884 (47 & 48 Vict. c. 18); the Settled Land Act, 1887 (50 & 51 Vict. c. 30); the Settled Land Act, 1889 (52 & 53 Vict. c. 36); sect. 2 of the 52 & 53 Vict. c. 30 (Board of Agriculture Act, 1889); sect. 74, sub-s. 1 of the 53 & 54 Vict. c. 70 (Housing of Working Classes Act, 1890); and

the Settled Land Act, 1890 (53 & 54 Vict. c. 69), which last-mentioned Act (sect. 17, as to the appointment and retirement of trustees) has in its turn also been amended by the Trustee Act, 1893 (56 & 57 Vict. c. 53).

(*e*) Act 1882, s. 2.

(*f*) Ibid. s. 59.

(*g*) Ibid. s. 2, sub-s. 6.

or not), to an estate tail after possibility of issue extinct; but the phrase “tenant for life” is not to include a dowress nor a tenant in tail of lands purchased with moneys provided by parliament in consideration of public services (*h*). An infant entitled in fee-simple or for other the whole estate in the land is a “tenant for life” for the purposes of the Act (*i*); and during his infancy (if a male), or during her infancy and coverture (if a female), the trustees of the settlement (and failing any, the nominees of the court) are to act for him or her (*k*). A married woman (being or being deemed a tenant for life), as regards her estate not being separate, acts with her husband (*l*), and as regards her separate estate, acts by herself as a *feme sole*, and is not (so far as regards any of the purposes of the Act) restrained by even an express restraint on anticipation (*m*). A lunatic, so found by inquisition (being or being deemed a tenant for life), acts by his or her committee with the sanction of the Lord Chancellor or Lords Justices sitting in lunacy (*n*); but a lunatic not so found cannot so act, the Lunacy Act, 1890, sects. 116, 120, 128, being inapplicable for any of the purposes of the Settled Land Acts.

The tenant for life (in the extended sense of that word, as above expressed) may exercise the following powers:—

(A.) As regards absolute alienations of the settled land:

A power to sell the settled land or any part thereof;

A power to enfranchise antient freehold lands by selling the seignory thereof, or customary freeholds or copyhold lands, by selling the freehold and inheritance thereof, with or without the mines and minerals;

(*h*) Sect. 58; In re Clitheroe Estate, 28 Ch. Div. 378; 31 Ch. Div. 135; In re Atkinson, 30 Ch. Div. 605; 31 Ch. Div. 577; In re Strangways, 34 Ch. Div. 423.

(*i*) Sect. 59.

(*k*) Sect. 60; In re Countess of Dudley's Contract, 35 Ch. Div. 338.

(*l*) Sect. 61.

(*m*) Ibid.

(*n*) Sect. 62; Re Martha Baggs, (1894) 2 Ch. 416, n.

A power to exchange the settled land or any part thereof; and

A power to concur in making partition of the settled land (*o*).

And upon any sale (*p*), or exchange, or partition (*q*), easements may be granted or given or taken, as the case may require.

(B.) As regards leases of the settled land :

A power to make building (including repairing) leases for ninety-nine years ;

A power to make mining leases for sixty years ; and

A power to make any other lease for twenty-one years,—and in any of these three cases, either with or without impeachment of waste ; and either of the settled land or of any part thereof ; or of any easement over it (*r*).

A power to accept surrenders of leases, and either in respect of the whole land leased or of any part thereof, or in respect of the mines and minerals only comprised therein (*s*).

A power (when the tenant for life is the lord of a manor) to grant licences to the copyholders to demise their copyhold lands,—the licence being for such periods only as the lease (in the case of freehold lands) might have been made for under the Act (*t*).

(C.) As regards improvements of the settled land :

A power to apply the capital moneys, arising under the Act in or towards the making and efficient construction of any of the twenty different species of improvements specified

(*o*) Sect. 3 ; and see sect. 19.

(*p*) Ibid.

(*q*) Act 1890, s. 5.

(*r*) Act 1882, s. 6.

(*s*) Sect. 13.

(*t*) Sect. 14.

in the Act (*u*), or which are authorized by the amending Acts (*x*), being improvements on or in connexion with or for the benefit of the settled land,—the improvements specified in the Improvement of Land Act, 1864 (*y*), being as from the 1st January, 1883, extended so as to include all the classes of improvements specified in the Settled Land Act, 1882 (*z*). And

(D.) As regards absolute alienations, leases, and improvements generally :

A power to enter into any contract or contracts preliminary thereto, and to vary and rescind the same, in all respects as if he was the absolute fee-simple owner, every such contract enuring for the benefit of the settled land (*a*) ; and also a power to complete by deed the contract of any predecessor in title of the tenant for life (*b*).

And the Act expressly declares and enacts that the afore-said powers may not be assigned or released by the tenant for life, and that they shall continue exerciseable by him although he shall have assigned his estate, and that any contract of his not to exercise them shall be void (*c*), without prejudice to the rights of any assignee for value of the estate of the tenant for life (*d*) ; but no assignment (unless by way of mortgage to secure a loan) made by a tenant for life in consideration of marriage or by way of family arrangement is to be deemed to constitute the assignee an assignee for value within the meaning of this provision (*e*). The Act further provides that anything in the settlement excluding, or contriving to exclude, or tending to exclude,

(*u*) Sect. 25.

(*x*) Act 1890, s. 13.

(*y*) 27 & 28 Vict. c. 114, s. 9.

(*z*) Act 1882, s. 30.

(*a*) Ibid. s. 31.

(*b*) Act 1890, s. 6.

(*c*) Act 1882, s. 50.

(*d*) Ibid. ; In re Sebright's Settled Estates, 33 Ch. Div. 429.

(*e*) Act 1890, s. 4.

the powers given by the Act to the tenant for life, or containing anything designed to induce him to abstain from exercising these powers, shall be void, so much so that an estate limited to him by way of conditional limitation until he does exercise or attempt to exercise the powers of the Act, or any of them, is discharged of the condition altogether, and is to be deemed an estate to continue for the longest possible time for which it would continue if no such condition was annexed thereto (*u*); also, no forfeiture is to result to the tenant for life from the exercise of these powers or any of them (*x*). The powers conferred by the Act may be exercised from time to time, and everything incidental to their full and effective execution may be done, as incidentally comprised in the power (*y*). The settlor may by the settlement confer larger powers either on the tenant for life or on the trustees; and if so, then these powers are to be exerciseable as if the Act had conferred such larger powers, with all incidental consequences (*z*). Lastly, the powers of the Act are not to interfere with other powers, howsoever given, but are to be cumulative; but in case of conflict, the powers of the Act are to prevail (*a*); and in case of doubt, the court will give its judicial opinion on summons under the Act (*b*). The pendency of an administration action does not prevent the tenant for life exercising these powers or any of them; and he may therefore, in such a case, sell without the sanction of the court (*c*).

For the due execution of the powers conferred upon the tenant for life, the Act has provided that there shall be trustees of the settlement,—and it defines these trustees as being the trustees with a power of sale, or with a power of consent to or approval of a sale, or (failing any such) the

(*u*) Act 1882, s. 51; *Kemp v. Haynes*, 37 Ch. D. 306.

(*x*) Sect. 52.

(*y*) Sect. 55.

(*z*) Sect. 57.

(*a*) Sect. 56; *In re Duke of Newcastle*, 24 Ch. Div. 129.

(*b*) Sect. 56.

(*c*) *Cardigan v. Curzon-Howe*, 30 Ch. Div. 531.

persons who by the settlement are declared to be the trustees thereof for the purposes of the Act; and (failing any such) the persons who under sect. 38 of the Act shall have been appointed by the court (*d*); and it having been held that the powers referred to must be powers presently exerciseable, and also exerciseable over the settled land itself which it was proposed to deal with (*e*), it has now been provided (*f*) that the powers may be powers exerciseable over any other land settled to the same uses, and failing any such powers, the trustees who will in the future have the powers of sale, &c., are made the trustees of the settlement. And a tenant for life when intending to make a sale, exchange, partition, or lease, or a mortgage or charge incidental thereto, is in general to give notice of his intention in that behalf to each of the trustees of the settlement by posting registered letters containing the notice addressed to the trustees severally, each at his usual or last-known place of abode in the United Kingdom, and is in general to give the like notice to the solicitor for the trustees, if any such solicitor is known to the tenant for life, by posting a registered letter containing the notice addressed to the solicitor at his place of business in the United Kingdom, every letter being posted not less than one month before the making by the tenant for life of the sale, exchange, partition, or lease, or of the mortgage or charge incidental thereto, or of any contract for the same; and the Act expressly provides that at the date of notice given the number of trustees shall not be less than two, unless a contrary intention is expressed in the settlement; but that any person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of any such notice (*g*). But, as regards such notices, it has been provided by the Settled Land Act, 1884 (*h*), s. 5, to

(*d*) Act 1882, s. 2, sub-sect. 8.

(*e*) *Wheelwright v. Walker*, 23

Ch. D. 752, 761.

(*f*) 53 & 54 Vict. c. 69, s. 16.

(*g*) Sect. 45.

(*h*) 47 & 48 Vict. c. 18.

obviate the effect of a contrary decision (*i*), that the notice required by section forty-five of the Act of 1882 of the intention to make a sale, exchange, partition, or lease, may be notice of a general intention in that behalf, the tenant for life furnishing to the trustees (on their request) all reasonable information from time to time with reference to sales, exchanges, partitions, or leases effected, or in progress, or immediately intended; and further, that any trustee by writing under his hand may waive notice either in any particular case or generally, and may accept less than one month's notice; and the Settled Land Act, 1890 (*k*), has now provided, as regards leases not exceeding twenty-one years reserving the best rent and without taking any fine and not exempting the lessee from punishment for waste, that such leases may be made by the tenant for life without his giving any notice at all, and although there should be no trustees of the settlement at all.

Moreover, it is not incumbent on the trustees (after or in consequence of receiving such notice or at all) to do anything by way of interfering with or controlling the proposed exercise by the tenant for life of the powers conferred upon him by the Act, or of any of such powers, excepting so far as the Act expressly requires their consent or concurrence; and the trustees are not to be liable for either giving or refusing their consent where such consent is required by the Act to the tenant for life's exercise of his powers (*l*).

A tenant for life, as regards the powers conferred upon him by the Act, is to be deemed to stand in a fiduciary relation to the persons entitled under the settlement, and he must accordingly have regard to their interests (*m*); nevertheless, on any sale, exchange, partition, lease, mortgage, or charge, a purchaser, lessee, mortgagee, or other

(*i*) *In re Ray's Settled Estates*,
25 Ch. Div. 464.

(*k*) 53 & 54 Vict. c. 69, s. 7.

(*l*) Act 1882, s. 42.

(*m*) Sect. 53.

person dealing in good faith with the tenant for life, shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price, consideration, or rent (as the case may require) that could reasonably be obtained by the tenant for life, and to have complied with all the requisitions of the Act (*n*) ; and in particular, a statement contained in a lease or in an indorsement thereon signed by the tenant for life, respecting any matter of fact or of calculation under the Act in relation to the lease, shall, in favour of the lessee and of those claiming under him, be sufficient evidence of the matter therein stated (*o*). The remedy (if any) will, therefore, in all cases, be a personal one against the tenant for life himself (*p*).

And in addition to, and in aid of, the specific provisions contained in the Settled Land Act, 1882, for raising money by mortgage of the settled land when such money is required for the due exercise of the powers of the tenant for life that are hereinbefore mentioned, the Act of 1890, s. 11, has provided that whenever money is required for the purpose of discharging an incumbrance on the settled land, the tenant for life may raise the money, together with the costs of the transaction, by mortgage of the settled land in fee simple or for a term of years or otherwise, and the money so raised is declared capital money and applicable accordingly ; but an incumbrance, within this section, is not to include any annual sum payable only during a life or lives or during a term of years. The Act of 1890 also provides (by sect. 12¹), that where a tenant for life is dealing with himself, the trustees of the settlement shall act on his behalf as tenant for life.

Having stated the provisions of the Act which are of general application, we may now proceed to refer to the specific provisions of the Act relative to the exercise of each of the particular powers conferred by the Act.

(*n*) Sect. 54.

(*p*) See *e.g.*, sect. 28, sub-s. 5.

(*o*) Sect. 7, sub-s. 5.

And Firstly, as regards Sales.—Every sale is to be made for the best price that can reasonably be obtained (*q*), but (as regards sites for artizans' dwellings) the price may be less than what would be obtainable if the land were sold for another purpose (*r*). The sale may be in one lot or in several lots, and either by public auction or by private contract (*s*), and with or without a reserve price or power to buy in (*t*), and subject or not subject to any stipulations regarding title, evidence of title, or otherwise (*u*); and the sale may be made subject to any restriction regarding the subsequent user of the land, or regarding building thereon, and subject to any reservation of mines and minerals or mining rights (*x*). When the sale is of land subject to any incumbrance, the tenant for life may (with the consent of the incumbrancer) charge the incumbrance on other part of the settled land in exoneration of that sold (*y*). The sale may extend even to the principal mansion house and to the demesnes thereof, but in that case either the trustees of the settlement must consent to the sale, or an order of the court must be obtained to sanction it (*z*); but a house usually occupied as a farm-house, or a house the site of which and of the lands usually occupied therewith does not exceed twenty-five acres, is not to be deemed, for the purposes of this restriction on the sale thereof, a principal mansion-house (*a*). Also, on or in connection with a sale (if the same is for building purposes), the tenant for life may, for the benefit of the residents on the settled land or on any part thereof, cause or require any parts of the settled land to be appropriated and laid out for streets or the like, or for gardens or the like; and may also provide that the parts so appropriated shall be vested in trustees,

(*q*) Act 1882, s. 4, sub-s. 1.

(*r*) 53 & 54 Vict. c. 69, s. 18;

c. 70, s. 74, sub-s. 1.

(*s*) Act 1882, s. 4, sub-s. 3.

(*t*) Ibid. sub-s. 4.

(*u*) Ibid. sub-s. 5.

(*x*) Sect. 4, sub-s. 6; and see sect. 17.

(*y*) Sect. 5.

(*z*) Act 1890, s. 10, sub-s. 2; In re Sebright's Settled Estates, 33 Ch. Div. 429.

(*a*) Sect. 10, sub-s. 3.

for securing the continued appropriation thereof to the purposes aforesaid, and he may execute the proper deed in that behalf, and procure the same to be enrolled in the Central Office of the Supreme Court of Judicature. And in completion of the sale, the tenant for life may, as regards the land sold (including copyhold or customary or leasehold land vested in trustees), or as regards easements and the like, convey or create the same by deed for the estate or interest the subject of the settlement, or for any less estate or interest, to the uses and in the manner necessary for giving effect to the sale (*b*) ; and the deed shall accordingly operate to pass the land conveyed, or the easements, rights, or privileges created, discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, subject of course to all estates which have priority to the settlement, and to all estates made under powers in the settlement for securing moneys actually raised at the date of the deed, and to all leases or other alienations already made for value and binding on the settlement (*c*) ; and if the deed comprises copyhold or customary land, the same is to be entered on the court rolls, and the purchaser is to be admitted thereon without any surrender or other act, so nevertheless that the lord's fines and the steward's fees be not thereby prejudiced (*d*). Also, under the Settled Land Act, 1890 (*e*), on a grant in fee-simple for building purposes, with the reservation of a perpetual rent issuing out of the land granted, the reservation operates to create a rentcharge in fee-simple and to attach thereto all the remedies for the recovery of a proper rentcharge which are given by the Conveyancing Act, 1881, as explained in a previous chapter (*f*).

(*b*) Act 1882, s. 20, sub-s. 1.

217.

(*c*) Ibid. s. 20, sub-s. 2.

(*e*) 53 & 54 Vict. c. 69, s. 9.

(*d*) Sect. 20, sub-s. 3 ; In re

(*f*) Supra, p. 622.

Naylor and Spendla, 34 Ch. D.

Secondly, as regards Exchanges and Partitions.—Every exchange and every partition is to be made for the best consideration in land, or in land and money, that can reasonably be obtained (*g*), or in consideration of or subject to the reservation of an undivided share in mines or minerals (*h*), and may be made subject or not subject to any stipulation regarding title, evidence of title, or otherwise (*i*), and subject to any restriction regarding the subsequent user of the land, or regarding building thereon, and subject to any reservation of mines and minerals or mining rights (*k*); and when the exchange or the partition is of land, or the exchange is for land subject to any incumbrance, the tenant for life may (with the consent of the incumbrancer) charge the incumbrance on other part of the settled land in exoneration of that given in exchange or partition or received in exchange (*l*). Also, where money is required for equality of exchange or of partition, the tenant for life may raise the same on mortgage of the settled land or of any part thereof, by a mortgage thereof, either in fee simple or for a term of years (*m*). And upon any exchange or partition, and in completion thereof, the tenant for life may, as regards the land given in exchange or on partition (including copyhold or customary or leasehold land vested in trustees), or as regards easements and the like, convey or create the same by deed for the estate or interest the subject of the settlement, or for any less estate or interest, to the uses and in the manner necessary for giving effect to the exchange or the partition (*n*); that is to say, the deed will operate in like manner *mutatis mutandis* as the deed completing a sale by the tenant for life is above expressed to operate under the Act (*o*). Also, under the Settled Land Act, 1890,

(*g*) Act 1882, s. 4, sub-s. 2; and sect. 17.
supra, p. 664, n. (*r*).

(*h*) Act 1882, s. 17, sub-s. 2.

(*i*) Sect. 4, sub-s. 5.

(*k*) Ibid. sub-s. 6; and see

(*l*) Sect. 5.

(*m*) Sect. 18.

(*n*) Sect. 20, sub-s. 1.

(*o*) Sect. 20, sub-ss. 2, 3.

sect. 5, in such deed, easements may be reserved or granted over the settled land or over any other land; and easements may be exchanged for easements or for land; and may be given or taken on partition.

Thirdly, as regards Enfranchisements.—Every enfranchisement may be made either with or without a re-grant of any right of common or other right, easement, or privilege theretofore appendant or appurtenant to, or held or enjoyed with, the land enfranchised, or reputed so to be (*p*); and, when money is required for enfranchisement, the tenant for life may raise the same on mortgage of the settled land, or of any part thereof, by a mortgage thereof either in fee simple or for a term of years (*q*).

Fourthly, as regards Leases.—Every lease is to be by deed, and to take effect in possession not later than twelve months after its date (*r*), and it is to reserve the best rent that can reasonably be obtained, regard being had to any fine taken (which fine is declared to be capital money) (*s*), and to any money laid out, or to be laid out, for the benefit of the settled land, and generally to the circumstances of the case (*t*); and it is to contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified, not exceeding thirty days (*u*); also, a counterpart of every lease is to be executed by the lessee and delivered to the tenant for life, of which execution and delivery the execution of the lease by the tenant for life is sufficient evidence (*x*); but a duplicate would, *semble*, suffice.

As regards Building Leases (*y*): Every building lease is to be made partly in consideration of the lessee, or some

(*p*) Sect. 4, sub-s. 7.

(*q*) Sect. 18.

(*r*) Sect. 7, sub-s. 1.

(*s*) Sect. 4.

(*t*) Sect. 7, sub-s. 2; and *supra*, p. 664, n. (*r*).

(*u*) Sect. 7, sub-s. 3.

(*x*) *Ibid.* sub-s. 4.

(*y*) Sect. 8.

person by whose direction the lease is granted, or some other person, having erected, or agreeing to erect, buildings, new or additional, or having improved or repaired, or agreeing to improve or repair, buildings, or having executed, or agreeing to execute, on the land leased, an improvement for or in connection with building purposes. A peppercorn rent, or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years, or any less part of the term. The building lease may give the lessee an option of purchase, to be exercised within any agreed number of years, not exceeding ten years (*z*). Also, where the land is contracted to be leased in lots, the entire amount of rent to be ultimately payable may be apportioned among the lots in any manner; save that—(1) The annual rent reserved by any lease is not to be less than ten shillings; and (2) The total amount of the rents reserved on all leases for the time being granted is not to be less than the total amount of the rent which, in order that the leases may be in conformity with the Act, ought to be reserved in respect of the whole land for the time being leased; and (3) The rent reserved by any lease is not to exceed one fifth part of the full annual value of the land comprised in that lease, with the buildings thereon, when completed.

As regards Mining Leases (*a*): (1) The rent may be made to be ascertainable by, or to vary according to, the acreage worked, or by or according to the quantities of any mineral or substance gotten, made merchantable, converted, carried away, or disposed of, in or from the settled land or any other land, or by or according to any facilities given in that behalf, or (under the Act of 1890) (*b*), by or according to the price of the minerals gotten, which price may be ascertained as in that Act prescribed; and (2) A fixed or minimum rent may be made payable, with or

(*z*) 52 & 53 Vict. c. 36 (Settled Land Act, 1889), s. 2.

(*a*) 45 & 46 Vict. c. 38, s. 9.

(*b*) 53 & 54 Vict. c. 69, s. 8.

without power for the lessee, in case the rent according to acreage or quantity in any specified period does not produce an amount equal to the fixed or minimum rent, to make up the deficiency in any subsequent specified period, free of rent, other than the fixed or minimum rent. Also, the lease may be made partly in consideration of the lessee having executed, or his agreeing to execute, on the land leased an improvement of the kind authorized by the Act for or in connection with mining purposes.

And generally, as regards both building and mining leases, where it is shown to the court with respect to the district in which any settled land is situate, either—(1) That it is the custom for land therein to be leased or granted for building or mining purposes for a longer term or on other conditions than the term or conditions specified in that behalf in the Act, or in perpetuity; or (2) That it is difficult to make leases or grants for building or mining purposes of land therein, except for a longer term, or on other conditions than the term and conditions specified in that behalf in the Act, or except in perpetuity; the court may (*c*), if it thinks fit, authorize generally the tenant for life to make from time to time leases or grants of or affecting the settled land in that district, or parts thereof, for any term or in perpetuity, at fee-farm or other rents, secured by condition of re-entry or otherwise, as in the order of the court expressed, or may, if it thinks fit, authorize the tenant for life to make any such lease or grant in any particular case.

Also, on or in connection with any building lease, the tenant for life (*d*), for the general benefit of the residents on the settled land, or on any part thereof, may make or procure to be made, the like appropriation of portion of the settled land for streets and the like, and for gardens and the like, as we have above mentioned in connection with a sale effected by the tenant for life, and may (by

(*c*) Act 1882, s. 10.

(*d*) Sect. 16.

deed or otherwise) provide also for securing the continued appropriation thereof for such purposes.

Also, a mining lease may be made with or without an exception or reservation of other mines or minerals, and with or without a lease of the settled land or any part thereof, and with or without a grant or reservation of powers of working and of wayleaves or rights of way, rights of water and drainage, and other powers, easements, rights, and privileges for or incident to or connected with mining purposes, in relation to the settled land or any part thereof, or any other land (*e*). But no lease, either of the principal mansion-house (if any) and of the demesne lands occupied therewith, for building or other purposes, or of the mines and minerals thereunder, or under any part thereof, may be made by the tenant for life under the leasing powers of the Act, unless he first obtain either the consent thereto of the trustees of the settlement, or else an order of the court authorizing the same (*f*).

And upon any lease, and in completion thereof, the tenant for life may, as regards the land leased (including copyhold or customary or leasehold land), and as regards easements or other rights or privileges leased, convey the lands or create the easements by deed for the term of the lease (not exceeding the estate or interest the subject of the settlement), to the extent of giving full effect to the lease; and the deed will operate in like manner *mutatis mutandis*, as the deed completing a sale by the tenant for life is above expressed to operate under the Act (*g*).

And as regards the leasing powers generally of a tenant for life, these extend (*h*) to the making of (*i*) a lease for giving effect to a contract entered into by any of his predecessors in title for making a lease which, if made by the predecessor, would have been binding on the successors in

(*e*) Sect. 17.

1882.

(*f*) Act 1890, s. 10, repealing
and re-enacting s. 15 of the Act of

(*g*) Act 1882, s. 20.
(*h*) Sect. 12.

title; and (ii) a lease for giving effect to a covenant of renewal, performance whereof could be enforced against the owner for the time being of the settled land; and (iii) a lease for confirming, as far as may be, a previous lease, being void or voidable; but so that every lease, as and when confirmed, shall be such a lease as might at the date of the original lease have been lawfully granted, under the Act, or otherwise, as the case may require.

Also, the tenant for life may accept, with or without consideration, a surrender of any lease of settled land (*i*), whether made under the Act or not, in respect of the whole land leased or any part thereof (with or without an exception of all or any of the mines and minerals therein) or in respect of mines or minerals; and on a surrender of a lease in respect of part only of the land or mines and minerals leased, the rent may be apportioned; and he may of course thereafter make a new or other lease, and the new or other lease may comprise additional land; and on accepting such surrender and making such new or other lease, the value of the lessee's interest in the lease surrendered may be taken into account in the determination of the amount of the rent to be reserved, and of any fine to be taken, and of the nature of the covenants, provisions, and conditions to be inserted in the new lease.

And, by way of concluding this exposition of the tenant for life's power of leasing, it should be mentioned that, in the case of mining leases, the Act expressly provides (*k*), that (unless the settlement itself provides to the contrary) there shall be from time to time set apart, as capital money arising under the Act, part of the rent, and that whether the mines have been already opened or in work or not, that is to say, where the tenant for life is impeachable for waste, three fourth parts of the rent, and where he is not impeachable for waste, then one fourth part thereof, and

(*i*) Sect. 13.

(*k*) Sect. 11; In re Duke of

Newcastle's Estates, 24 Ch. Div.

129.

in either case the residue only of the rent is to be dealt with as income; and a similar provision applies to the proceeds of the sale of timber ripe for cutting (*l*); but, of course, when the land is sold with the timber thereon, the whole purchase-moneys (although the price of the timber should be ascertained separately, *e.g.*, by valuation) are capital moneys (*m*).

Fifthly, as regards Improvements.—Where improvements are proposed to be made by the tenant for life with capital money arising under the Act, the Act provides as follows (*n*): that the tenant for life shall, in general, submit for approval to the trustees of the settlement, or to the court, as the case may require, a scheme for the execution of the improvement, showing the proposed expenditure thereon; but the court may dispense with such scheme in a proper case (*o*); and where the capital money to be expended is in the hands of trustees, then, after a scheme is approved by them, the trustees may apply that money in or towards payment for the whole or part of any work or operation comprised in the improvement, on—(1) a certificate of the Board of Agriculture (*p*), certifying that the work or operation, or some specified part thereof, has been properly executed, and what amount is properly payable by the trustees in respect thereof, which certificate shall be conclusive in favour of the trustees as an authority and discharge for any payment made by them in pursuance thereof; or on (2) a like certificate of a competent engineer or able practical surveyor nominated by the trustees and approved by the Board, or by the court, which certificate shall be conclusive as aforesaid; or on (3) an order of the court directing or authorizing the trustees to so apply a specified portion of the capital money; and where the capital money to be expended is in court, then, after a

(*l*) Sect. 33.

(*m*) *Llewellyn v. Williams*, 37

Ch. D. 317.

(*n*) Sect. 26.

(*o*) Act 1890, s. 15.

(*p*) 52 & 53 Vict. c. 30, s. 2.

scheme is approved by the court, the court may, if it thinks fit, on a report or certificate of the Board, or of a competent engineer or able practical surveyor approved by the court, or on such other evidence as the court thinks sufficient, make such order and give such directions as it thinks fit for the application of that money, or any part thereof, in or towards payment for the whole or any part of any work or operation comprised in the improvement; or such moneys may be paid out to the trustees of the settlement to be in like manner applied by them (*q*). And as regards the subsequent maintenance of the improvements so made, the Act provides (*r*), that the tenant for life, and each of his successors in title, having under the settlement a limited estate or interest only in the settled land, shall, during such period, if any, as the Board of Agriculture by certificate in any case prescribe, maintain, and repair, at his own expense, every improvement executed under the Act, and where a building or work in its nature insurable against loss or damage by fire is comprised in the improvement, shall insure and keep insured the same, at his own expense, in such amount, if any, as the Board by certificate in any case prescribe; and shall from time to time, if required by the Board, on or without the suggestion of any person having under the settlement any estate or interest in the settled land in possession, remainder, or otherwise, report to the Board the state of every improvement executed under the Act, and the fact and particulars of the fire insurance, if any; and if the tenant for life, or any of his successors as aforesaid, fails in any respect to comply with the requisitions aforesaid, or does any act in contravention thereof, any person having under the settlement any estate or interest in the settled land in possession, remainder, or reversion, shall have a right of action, in respect of that default or act, against the tenant for life; and the estate of the tenant for life, after his death, shall

(*q*) Act 1890, s. 14.(*r*) Act 1882, s. 28.

be liable to make good to the persons entitled under the settlement any damages occasioned by that default or act. And with a view to enabling the tenant for life not only to execute in the first instance, but also thereafter to maintain in good repair, the improvements aforesaid, the Act provides (*s*), that he may commit waste (not being equitable waste) with impunity, either as regards minerals, timber, or otherwise.

The capital moneys arising under the Act, that is to say, capital moneys arising in respect of any dealings with the settled land under the powers conferred by the Act on the tenant for life, and which are therefore receivable upon the trusts and for the purposes of the settlement, are to be paid either to the trustees of the settlement or into court, and the tenant for life has the option as to which of these modes of payment shall be adopted (*t*). Where the capital moneys are paid to the trustees, there must be two trustees at the least (unless the settlement authorizes one trustee to receive them) (*u*); and the trustees or (if the case is so) the trustee may give an effective receipt for the moneys so paid to them or him (*x*); and each trustee is to be answerable for his own receipts only, and not for any loss of capital moneys, even when received by him, unless the loss arises through his own wilful default (*y*). Every trustee may also reimburse himself his charges and expenses out of the capital moneys (*z*).

Capital moneys arising under the Act will be applicable primarily for the specific purpose (if any) for which they were raised, *e. g.*, to pay for equality of exchange, or to pay the consideration-moneys on an enfranchisement; and subject thereto, and to any other payments (*e. g.*, for costs and expenses), primarily payable out of the capital moneys, they are to be applied (representing in fact, and being a

(*s*) Sect. 29.

(*t*) Sect. 22; *Cookes v. Cookes*,

34 Ch. Div. 498.

(*u*) Sect. 39.

(*x*) Sect. 40.

(*y*) Sect. 41.

(*z*) Sect. 43.

substitute for, the settled land) in all or some or one of the following ways (*a*), that is to say :

- (i) In investment on Government securities, or on other securities on which the trustees of the settlement are by the settlement or by law authorized to invest trust money of the settlement or on the securities of the bonds, mortgages, or debentures, or in the purchase of the debenture stock, of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares, with power to vary the investment into or for any other such securities :
- (ii) In the discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land tax, rent-charge in lieu of tithe, Crown rent, chief rent, or quit rent, charged on or payable out of the settled land :
- (iii) In payment for any improvement authorized by the Act :
- (iv) In payment for equality of exchange or partition of settled land :
- (v) In the purchase of the seignory of any part of the settled land, being freehold land, or in the purchase of the fee simple of any part of the settled land, being copyhold or customary land :
- (vi) In the purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or life or years determinable on life :
- (vii) In the purchase of land in fee simple, or of copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the time of

(*a*) Sect. 21 ; *Clarke v. Thornton*, 35 Ch. Div. 307.

purchase, subject or not to any exception or reservation of or in respect of mines or minerals therein, or of or in respect of rights or powers relative to the working of mines or minerals therein or in other land :

- (viii) In the purchase, either in fee simple, or for a term of sixty years or more, of mines and minerals convenient to be held or worked with the settled land, or of any easement, right, or privilege convenient to be held with the settled land for mining or other purposes :
- (ix) In payment to any person becoming absolutely entitled to, or empowered to give an absolute discharge for, the capital moneys :
- (x) In payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions of the Act :
- (xi) In any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder (*b*).

Capital moneys received by trustees of the settlement are to be invested by them according to the direction of the tenant for life, and failing any such direction, at their (the trustees') own discretion, but with such (if any) consents as the settlement requires (*c*) ; and no investment is to be altered or varied unless with the consent of the tenant for life (*d*) ; capital moneys paid into court are to be invested, or otherwise applied, under an order of the court to be obtained by the tenant for life, or by the trustees (*e*) ; or, as we have seen, they may be paid out to the trustees to be duly invested by them. The investments, and the moneys until invested, are to be considered as land

(*b*) In re Lord Aylesford's Settled Estates, 32 Ch. Div. 162.

(*c*) Sect. 22, sub-s. 2.

(*d*) Ibid. sub-s. 4 ; In re Clitheroe Estate, 28 Ch. D. 378 ; 31 Ch. Div. 135.

(*e*) Sect. 22, sub-s. 3.

for all purposes of alienation or devolution (*f*), and the income thereof is to go and be paid as the rents and profits of the settled land. And, in particular, when the capital money is purchase-money paid in respect of a lease for years, or life, or years determinable on life, or in respect of any other estate or interest in land less than the fee simple, or in respect of a reversion dependent on any such lease, estate, or interest, the trustees of the settlement, or, as the case may be, the court, and in the case of the court on the application of any party interested in that money, may, notwithstanding anything in the Act, require and cause the same to be laid out, invested, accumulated and paid in such manner as in the judgment of the trustees or, as the case may be, of the court, will give to the parties interested in that money the like benefit therefrom as they might lawfully have had from the lease, estate, interest, or reversion in respect whereof the money was paid, or as near thereto as may be (*g*).

Lands acquired by purchase with capital moneys arising under the Act, or acquired by exchange or on partition, are to be settled to, for, and upon the uses, purposes, and trusts of the settlement (*h*); and in particular (1) Freehold land is to be conveyed to the uses, on the trusts, and subject to the powers and provisions which, under the settlement, or by reason of the exercise of any power of charging therein contained, are subsisting with respect to the settled land, or as near thereto as circumstances permit, but not so as to increase or multiply charges or powers of charging; and (2) Copyhold, customary, or leasehold land is to be conveyed to and vested in the trustees of the settlement, on trusts and subject to powers and provisions corresponding, as nearly as the law and circumstances permit, with the uses, trusts, powers, and provisions to, on, and subject to which freehold land is to be conveyed as

(*f*) Sect. 22, sub-s. 5.

(*h*) Sect. 24.

(*g*) Sect. 34.

aforesaid, but so, nevertheless, that the beneficial interest in land held by lease for years shall not vest absolutely in a person who is by the settlement made by purchase tenant in tail, or in tail male, or in tail female, and who dies under the age of twenty-one years, but shall on the death of that person under that age go as freehold land conveyed as aforesaid would go. Also, land acquired as aforesaid may be a substituted security for any charge in respect of money actually raised and remaining unpaid from which the settled land or any part thereof, or any undivided share therein, has theretofore been released, on the occasion, and in order to the completion, of a sale, exchange, or partition.

Regarding heir-looms and personal chattels settled in trust so as to devolve with land until a tenant in tail of the land entitled thereto by purchase (as opposed to descent) is born or attains the age of twenty-one years, or so as otherwise to vest in some person becoming entitled to an estate of inheritance in the land, the Act provides (*i*), that the tenant for life of the land may (but only with the sanction of the court) sell the heir-looms, or chattels, or any of them; and the sale-proceeds are to be dealt with as capital moneys arising under the Act, and in addition may be invested in the purchase of other chattels of the like or any other nature, to be settled upon the like trusts as the heir-looms or chattels sold.

In a trader's settlement (as it is called, to distinguish it from a strict settlement), the settled land is usually settled upon trust for sale, and the rents and profits of the land until sale, and the income of the sale-proceeds when invested, are usually given to one or more persons for his, her, or their lives, and the capital moneys are afterwards divisible among the children of the marriage and their descendants. To such a settlement, all the beneficial

(*i*) Sect. 37; *Fane v. Fane*, 2 Ch. Settlement, 30 Ch. Div. 127; 32 Div. 711; *Re Carnac*, 30 Ch. Div. Ch. Div. 1.
136; *In re Duke of Marlborough's*

provisions of the Settled Land Acts are applicable, *mutatis mutandis* (*k*). It is obvious, however, that such land is for all purposes of transmission and devolution merely personal estate; consequently the trust funds are not to be invested in the purchase of land, unless there is an express provision in the settlement authorizing such an investment (*l*); and there is also this great distinction between strict settlements and the trader's settlements now under consideration, namely, that by the provisions of the Settled Land Act, 1884 (*m*), a tenant for life under a trader's settlement can only exercise, under the sanction of the court, the powers conferred upon the tenant for life under a strict settlement.

(*k*) Sect. 63.

(*m*) 47 & 48 Vict. c. 18, ss. 6, 7.

(*l*) Ibid. sub-s. 2.

CHAPTER XXV.

OF REGISTRATION OF TITLE TO LAND.



IN former parts of the present volume we have explained the methods by which estates in land are at the present day transferred from one owner to another. But to these modern conveyances, it has been commonly imputed as a defect, that they are not attended with that notoriety which was attendant upon the feudal manner of conveyance, that is to say, the feoffment with its livery of seisin; or even with the notoriety which attended upon the old Saxon custom of transacting all conveyances at the sheriff's county court, and entering a memorial of them in the chartulary or leger-book of some adjacent monastery (*a*). And it is undoubtedly true, that modern conveyances of land have been for the most part private, only a very few of them requiring enrolment; and the inconveniences resulting from this have been strongly felt,—more particularly in the very populous counties of Middlesex and Yorkshire. In the former of these two counties, accordingly, that is to say, in Middlesex, a check was early provided against secret deeds, conveyances, wills, and other incumbrances, by the statute 7 Anne, c. 20, which statute (excepting as regards a few sections thereof) is still in force, and has been recently amended by the Land Registry (Middlesex Deeds) Act, 1891 (*b*), whereby the Middle-

(*a*) 2 Bl. Com. p. 342.

(*b*) 54 & 55 Vict. c. 64; see First

Schedule also, Rules of February, 1892.

sex Registry has been amalgamated with the Land Registry hereinafter mentioned; and as regards Yorkshire, the like check was provided by the statutes 2 & 3 Anne, c. 4, and 6 Anne, c. 20 (for the West Riding of that county), and by the statute 6 Anne, c. 62 (for the East Riding), and by the statute 8 Geo. II. c. 6 (for the North Riding), all which four last-mentioned statutes have been recently repealed, and their provisions, with certain amplifications and modifications, re-enacted, promiscuously for the whole county, in and by the Yorkshire Registries Act, 1884 (*c*). These enactments have provided that any deed, conveyance, or devise which shall affect land of freehold tenure, situate in either of those two counties (but not including leases at rack rent, or for twenty-one years or under, where the actual possession goes along with them), shall be fraudulent and void against a subsequent purchaser or mortgagee, unless a memorial thereof shall have been *registered* in such manner and within such period as the Acts direct; but in fact such unregistered deeds were never void if the subsequent purchaser or mortgagee had notice of them (*d*); and by the Vendor and Purchaser Act, 1874 (*e*), s. 8, unregistered wills were made good in favour of a purchaser from the devisee who registered his purchase deed before any purporting purchaser from the heir-at-law had registered his purchase deed. But now, as regards lands in Yorkshire, a document is really and truly void if unregistered, whether the subsequent purchaser has notice of it or not, unless in cases of actual fraud (*f*); and the Registry Acts for Yorkshire contain also provisions for registering titles which are not evidenced by any document, *e.g.*, intestacies; also liens, and equitable mortgages effected by the mere deposit of title deeds.

(*c*) 47 & 48 Vict. c. 54, amended by the 48 Vict. c. 19, and the 48 & 49 Vict. c. 26.

(*d*) *L'Neve v. L'Neve*, 1 Ves. sen. 64; *Tunstall v. Trappes*, 3

Sim. 301; *Credland v. Potter*, Law Rep., 18 Eq. Ca. 350; *Bradley v. Riches*, 9 Ch. Div. 212.

(*e*) 37 & 38 Vict. c. 78.

(*f*) 47 & 48 Vict. c. 54, s. 14.

But excepting as regards Middlesex and Yorkshire and (we may add) parts of Bedfordshire (*g*), the policy of the Registry Acts has never been adopted in England; and “it has been doubted by very competent judges whether more disputes have not arisen in those counties by the inattention and omission of parties, than prevented by the use of registers” (*h*); also, owing to the great increase and subdivision of tenements in Middlesex and Yorkshire, especially on building estates, the registers have grown very cumbrous and difficult to search through, the guiding particulars which were sufficient in the reign of Queen Anne having now become ludicrously insufficient. Yet, in our own times, many have been of opinion, that a system of registration of title might be devised which, by the advantages it offered, should induce landholders to avail themselves of its provisions; and which, in its operation, should not merely protect purchasers and mortgagees against insecure titles, but should also subserve the more general object of simplifying titles and facilitating the transfer of land in England.

These views have been at different times, and with more or less division of opinion, adopted by the legislature, and more than one attempt has been made to carry them into effect, but invariably without much success. Thus, in the year 1862, by the 25 & 26 Vict. c. 53, an office, under the name of the “Land Registry,” was established; and (among other things) provision was made for the registration therein of an indefeasible title to lands, when the title (on such investigation as in the Act directed) was found to be a valid marketable title; but the great and favourable expectations which attended the establishment of the Land Registry have not been altogether confirmed by experience; although, of more recent years, a greater use has been made of this Registry,—especially since the Land Transfer Act, 1875 (*i*) (whereby the Land Registry was

(*g*) 15 Car. 2, c. 17, s. 8.

(*i*) 38 & 39 Vict. c. 87.

(*h*) 2 Bl. Com. 343.

re-constituted), and the Land Charges Registration and Searches Act, 1888 (*k*); and we propose, therefore, to state the chief provisions of these two Acts, though a detailed account of them would be improper in a work like the present.

Firstly,—The Land Transfer Act, 1875.—This Act deals separately with freehold and with leasehold property; and it affects only lands of freehold tenure as distinct from lands of copyhold or customaryhold tenure; but of course an enfranchisement deed would be a deed affecting lands of freehold tenure within the meaning of the Act (*l*).

(A.) *The Registration of Freeholds*.—An application to be put on the register, either in his own name or in the name of a nominee or nominees, may be made by any person, 1, who has contracted to buy for his own benefit an estate in fee simple (subject or not to incumbrances); or, 2, who is entitled for his own benefit, at law or in equity, to such an estate; or, 3, who is capable of disposing for his own benefit by way of sale of such an estate; but in the case first supposed, he must have obtained the consent of the vendor to the application being made. The application (which is made to the registrar of the Land Registry) is, in its terms, for registration as proprietor of the fee simple of the estate in question, and either with an *absolute* or with a title *possessory* only (*m*); and where the title required is “absolute,” the application is not to be granted by the registrar unless he approves of the title; but where the title required is “possessory” only, then it is sufficient for the purpose of registration, if the applicant gives such evidence of his title, and serves such notices, as may for the time being be prescribed by rules made to carry out the Act (*n*).

With regard to the effect of registration, the Act provides that in the first registered proprietor with an “absolute” title shall vest an estate in fee simple, free from all other

(*k*) 51 & 52 Vict. c. 51.

(*m*) Act 1875, s. 5.

(*l*) *The Queen v. Middlesex*

(*n*) Sect. 6.

Registrar, 21 Q. B. D. 555.

estates and interests (including those of the Crown), but subject to certain qualifications specified in the Act (*o*), and which qualifications refer—1. To any incumbrances entered on the register; 2. To such liabilities, rights and interests as are declared by the Act not to be incumbrances (*p*); and 3. To any unregistered estates, rights, interests, or equities to which any persons may be entitled who claim under the registered proprietor. And the Act further provides, that registration with a “possessory” title only shall have the same effect as registration with an absolute title, except that it shall not affect or prejudice the enforcement of any estate, right, or interest adverse to, or in derogation of, the registered title (*q*); and where upon any application for registration with an “absolute” title, it appears to the registrar, on examination, that the title can be established only for a limited period, or subject to certain reservations, the title may be registered as a “qualified” one (*r*); and on completion of the registration, with whatever title, the registered proprietor is supplied with a “land certificate,” which states among other particulars whether the title is absolute, possessory, or qualified (*s*).

(B.) *The Registration of Leaseholds*:—A separate register is to be kept for these; and, as in the case of freeholds, application for registration, either in his own name or in the name of a nominee or nominees, may be made by any person, 1. who has contracted to buy the leaseholds; or, 2. who is entitled thereto for his own benefit either at law or in equity; or, 3. who is capable of disposing of the same for his own benefit by way of sale; but in the case first supposed, just as in the like case with freeholds, the applicant must have obtained the consent of the vendor to the application being made (*t*). And where the lease under which the land is held is derived immediately out of freehold land, and the applicant for registration is able to submit for examination

(*o*) Sect. 7.(*r*) Sect. 9.(*p*) Sect. 18.(*s*) Sect. 10.(*q*) Sect. 8.(*t*) Sect. 11.

the title of the lessor, it may form part of the application that the registration shall contain a declaration of the title of the lessor to grant the lease under which the land is held (*u*). The applicant is to deposit with the registrar the lease of the land, and no applicant or his nominee can be registered as proprietor unless and until his title to the leasehold shall be approved by the registrar; nor (if the application shall extend to asking for a declaration of the lessor's title) unless and until the lessor is declared to have an absolute or (as the case may be) qualified title to grant the lease in question (*v*).

With regard to the effect of registration, the Act provides that in the first registered proprietor who has obtained a declaration that the lessor had an absolute title to grant the lease, shall vest the possession of the land for all the estate therein described free from all other estates and interests (including those of the Crown), but subject to certain qualifications specified in the Act, viz.: 1, Covenants, express and implied, obligations, and liabilities incident to the estate; 2, any incumbrances entered on the register; 3, liabilities, rights, and interest declared by the Act not to be incumbrances; 4, unregistered estates, rights, interests, and equities of persons claiming under the first registered proprietor (*x*). And the Act further provides, that any registration made without a declaration of such absolute title shall have the same effect, except that it shall not affect or prejudice any estate, right, or interest adverse to, or in derogation of, the title of the lessor to grant the lease under which the land is held (*y*); and where upon an application asking for a declaration of the lessor's title it appears to the registrar on examination that the title can be established only for a limited period or subject to certain reservations, the declaration of title may be *qualified*, and the registration made with a declaration of such qualified

(*u*) Sect. 11.(*v*) Sect. 12.(*x*) Sect. 13.(*y*) Sect. 14.

title has the same effect as registration with a declaration of absolute title, except that the registration is not to affect or prejudice any right or interest which shall have been excepted by the registrar, and which shall appear by the register to have been so excepted by him (z); and on completion of the registration, the registered proprietor receives from the registrar an "office copy" of the registered lease, endorsed with a statement as to whether any declaration of title (absolute or qualified) has been made, and (where the declaration of title is qualified) the indorsement mentions the rights or interests which have been excepted by the registrar (a).

Land (whether freehold or leasehold), being once registered under the Act, may be afterwards dealt with either as registered land, or as if it had not been in fact registered at all. And with regard to *mortgages* of registered land, either freehold or leasehold, every registered proprietor may charge such land with the payment of any principal sum of money at an appointed time, either with or without interest, and including a power of sale in default of payment,—by a simple entry by the registrar on the register; and the registrar thereupon delivers to the proprietor of the charge a certificate in the prescribed form; and such registered charge carries with it the implied covenants for payment of principal and interest, a right of entry and seizure of rents and profits in default of payment, and a power to enforce foreclosure or sale (b). And with regard to the *transfer* of registered land, whether freehold or leasehold, from one proprietor to another, that may also be effected by a simple entry on the register; and a registered charge may in like manner be transferred from one proprietor to another; and devolutions or transmissions, of the registered title or estate from one proprietor to another, whether on

(z) Sect. 15.

(b) Sects. 22, 23.

(a) Sect. 16.

death, bankruptcy, or marriage, are evidenced by the like simple entry on the register (*c*). Moreover, any one having title to the registered land may, subject always to the maintenance of the estate and right of the registered proprietor, create estates, rights, interests, and equities in the registered land (according to his own title therein) in the same manner as he might do if the land was not registered; and any estates, rights, interests, or equities in registered land so created may be protected against any act of the registered proprietor, by notices, cautions, inhibitions or other restrictions entered upon the register in manner provided by the Act (*d*).

And before leaving the Land Transfer Act, 1875, we should mention that (by sect. 125) it excludes for the future any registration under the Registration Act, 25 & 26 Vict. c. 53, before mentioned; and that (by sect. 126) any proprietor registered under that earlier Act, may, if he choose, re-register under the Act of 1875, but is not obliged to do so, and until he does, the effects of the existing registration under the earlier Act are to remain; also, that (by sect. 127) land situate within the jurisdiction of the local registries of Middlesex and Yorkshire, if the same is registered under the Act of 1875, is exempt from the necessity of registration also in the local registry.

And in conclusion on this subject, we will here draw attention to the new provisions contained in the Small Holdings Act, 1892 (55 & 56 Vict. c. 31), and the rules (dated the 9th August, 1892) made under section 10 of that Act, under which land acquired by county councils, to be sold by them as small holdings (such holdings being in the nature of allotments for the industrious poor), may be registered, in like manner as land is registered under the Land Transfer Act, 1875, and with substantially the same results and consequences; and the duty of carrying out the Act is, by the Local Government Act, 1893 (56 & 57 Vict.

(*c*) Sects. 29—39.

(*d*) Sect. 49.

c. 73), devolved upon the parish council (*e*), in the case of rural parishes.

Secondly,—The Land Charges Registration and Searches Act, 1888.—This Act has enacted as follows: Firstly, as regards “writs and orders affecting land,” that there shall be established and kept at the office of Land Registry a special register, called “the register of writs and orders affecting land;” and that in such register there may be registered any writ or order affecting land issued or made by any court for the purpose of enforcing a judgment, statute or recognizance, or any order appointing a receiver or sequestrator of land (sect. 5), the entry being made in the name of the person whose land is affected, and the registration enduring for five years, and being in lieu of the registration of such writ or order in the central office; and any such writ or order, unless registered, is void against a purchaser for value, mortgagee, or lessee of the land (sect. 6), existing registrations in the central office (during the remainder of their currency), and *lites pendentes* duly registered at the central office, being excepted; but (under a later statute) (*f*), the registration of any such writ or order may be vacated under an order of the court to be obtained for the purpose. And the Act of 1888, has enacted, Secondly, as regards “deeds of arrangement,”—that there shall be kept at the office of Land Registry a special register, called “the register of deeds of arrangement;” and that deeds of arrangement may be registered therein in the name of the debtor (sect. 7), on the application either of the trustee of the deed, or of any creditor taking the benefit of the deed (sect. 8); and any such deed, unless registered, is void against a purchaser for value, mortgagee, or lessee of the land; and this registration is additional to, and not in substitution for, the registration

(*e*) See also 50 & 51 Vict. c. 48; 53 & 54 Vict. c. 65; 54 & 55 Vict. c. 33. And see 2 Will. 4, c. 42; 36 & 37 Vict. c. 19; and 45 & 46 Vict. c. 80, as to “*poor allotments*.” (Sutton Parish to Church, 25 Ch. Div. 173.) (*f*) 53 & 54 Vict. c. 19, s. 19.

required by the Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57). Thirdly, and Lastly, the Act of 1888 has enacted, as regards “land charges” (*g*),—that there shall be kept at the office of Land Registry a special register, called “the register of land charges”; and that land charges may be registered therein—the registration (in the case of freehold lands) being made in the name of the person beneficially entitled to the first estate of freehold at the time of the creation of the land charge, and (in the case of copyhold lands) being made in the name of the tenant on the court rolls at that time, and also (if it should so happen) in the name of the person who (being entitled only to a lease for life or lives, at a rent, or for a term of years) has procured the rent-charge to be created (sect. 10); and the Act expressly provides (by sect. 12) that every land charge created after the 31st December, 1888, which shall not have been duly registered under the Act, shall be void against a purchaser for value, mortgagee, or lessee of the land. Also (by sect. 13), a land charge created before that day is required to be registered within a year after the first assignment thereof which shall be executed after the 31st December, 1888.

It is evident that the object which the legislature has had in view in all the Local Registry, Land Registry, and other Registration Acts hereinbefore referred to, has been not merely to simplify (for the sake of simplification) the dealings with land, but to secure also more or less (and more rather than less) the title to and enjoyment of lands by purchasers and others, free from any in-

(*g*) “*Land charge*” is defined by the Act (sect. 4) as meaning a rent or annuity, or principal moneys payable by instalments or otherwise, with or without interest, charged (otherwise than by deed) upon land, under the provisions of any Act of Parliament for securing to any person either the moneys spent by him, or the costs, charges,

and expenses incurred by him, under such Act; or the moneys advanced by him for repaying such moneys, or such costs, charges, and expenses; also, a charge under sect. 35 of the Land Drainage Act, 1861, or under sect. 29 of the Agricultural Holdings Act, 1883: but not a “rate” or “scot.”

interruption to their title or disturbance of their enjoyment. Nevertheless, registered dealings with lands are attended with certain disadvantages; for mortgages and charges (even land charges, judgments, and the like) are not intended to be forthwith discharged so soon as they are effectively created, but are rather intended to (and do usually) continue in existence for a long time after their creation; and the multiplicity of them, which ensues therefore, eventually after a few years, adds greatly to the difficulty of clearly ascertaining, even in the case of registered land, on the occasion of each subsequent dealing with the land by way of sale or mortgage, that the title is in fact free from incumbrance, and from other such like matters affecting (or which may affect) either the title to or the full and free enjoyment of the lands,—whereby also solicitors and trustees conducting or effecting purchases and mortgages on behalf of their clients and *cestuis que trustent* respectively, have been many times hit, as for negligence in not discovering in time the registered adverse dealing, and have accordingly been made liable to personally make good the loss sustained. The Acts, therefore, which we have been discussing contain in general a provision, whereby solicitors and trustees may procure an official search to be made in the registries, and an official certificate to be given them of the result of such searches; and the Conveyancing Act, 1882 (*h*), having paved the way for such official searches and official certificates in the case of judgments, crown debts, and the like, the provisions of that Act in this behalf have been in general adopted also, by reference or otherwise, in the more recent Acts concerning registration, *e.g.*, by sect. 17 of the Lands Charges, &c. Registration Act, 1888, and by sect. 2 of the Land Registry (Middlesex Deeds) Act, 1891; and by the First Schedule to the last-mentioned Act, and the express provisions of a rule (*i*) made for carrying into effect its provisions, when anyone obtains, in the prescribed

(*h*) 45 & 46 Vict. c. 39, s. 2.

(*i*) Rules of Feb. 1892, r. 14.

manner, an official certificate of search (*scilicet*, in respect of matters proper for registration in the Land Registry, Middlesex Registration Branch), he shall not be answerable in respect of any loss that may arise from error in such certificate; and where such a certificate is obtained by any solicitor acting for trustees, executors or other persons in a fiduciary position, these latter or any of them shall not be answerable in respect of any loss so arising; and apparently the solicitor so acting will also be protected by the certificate from all liability as for negligence; at all events, the 8th sub-section of sect. 2 of the Conveyancing Act, 1882, expressly so enacts, as regards matters falling within the purview of the searches thereby provided for; and in favour of purchasers and as against persons interested under any registered titles of the character in question, the 3rd sub-section of the same 2nd section has provided, that the official certificate shall, according to the tenor thereof, be conclusive; and no compensation is thereby provided for the detriment the adverse party may sustain, from or by reason of the conclusiveness of the certificate.

It was apparently also with the same object in view, namely, that of protecting, at all hazards to others, the most recent purchaser or mortgagee of lands, that the Conveyancing Act, 1881 (*k*), sect. 70, has enacted (as we stated when specifically discussing the provisions of that Act) (*l*), that, in favour of a purchaser, mortgagee or lessee, an order of the Chancery Division of the High Court under any statutory or other jurisdiction shall be (in effect) a full protection to the purchaser, mortgagee or lessee, notwithstanding any want of jurisdiction or notwithstanding the want of any concurrence, consent, notice or service, if and so far as the purchaser, mortgagee or lessee rightfully relied on the order (*m*); but in view of the far-reaching

(*k*) 44 & 45 Vict. c. 41.

(*l*) Vide *supra*, p. 650.

(*m*) In re Hall-Dare's Contract,
21 Ch. D. 41.

effects of this particular provision of the Conveyancing Act, 1881, the judges very naturally observe the supremest care in making the orders they make; and, moreover, the protection afforded by the order may hereafter be proved to be less extensive than the provisions of sect. 70 might, on the first reading of them, appear to suggest.

A somewhat similar object appears also to have been in view, when the legislature enacted, in 1862, the 25 & 26 Viet. c. 67, whereby a *judicial* declaration of title might be obtained, provided the conditions prescribed by that Act were complied with. The prescribed conditions were, however, of so burdensome a character as to have almost rendered it an impossibility to proceed either economically or at all under the Act; and the Act has accordingly proved a dead letter; still the provisions of the Act, seeing that they remain unrepealed, may be stated before we conclude this chapter,—although it is sufficient to state them with brevity. The Act, after reciting the expediency of enabling landowners to obtain, by judicial declaration, a title that should be indefeasible in favour of purchasers for value, enacted that, on the petition of the landowner, the Court might order his title to be investigated in the same way as if he had obtained, as vendor, a decree for the specific performance of an agreement for the sale of the land in question for the estate claimed in his petition (*n*); and that, after such investigation, if the Court was satisfied that the petitioner had shown such a title as it would have compelled an unwilling purchaser to accept, it should (on the conditions in the Act mentioned) make an order that, on some day not less than three months afterwards, a declaration should be made establishing the petitioner's title, unless in the meantime cause was shown to the contrary (*o*): And in order to secure the object of duly affording to all persons concerned the opportunity of showing cause against the making of the

(*n*) Sect. 6.

(*o*) Sect. 8; In re Roberts, L. R. 10 Eq. Ca. 402.

declaration, a copy of the order was required to be served on such persons, and deposited in such places, as in the Act described for inspection; and such notice of the same having been so deposited was also to be duly given as by the Act prescribed; and the petitioner was required also to cause advertisements to be inserted three times at least in such newspapers, and on such days, as the Court should direct, stating the order and also stating where any copy of it had been so deposited for inspection (*p*). Then, if no petition was presented against the proposed declaration of title within the time limited for that purpose, or if one had been presented, but the Court was of opinion that no sufficient ground had been shown for refusing to make the declaration, the Court, upon being satisfied that all the requisitions prescribed by the Act had been duly complied with, made a declaration, that the petitioner had such title to the lands in question as he sought to establish by his petition, or such title subject to any qualifications necessary or proper to introduce into the order (*q*): And the effect of the declaration of title, once obtained, is by the Act stated as follows:—"That such declaration of title, as
 " soon as it shall have become final for the purpose of this
 " Act, shall (in favour of any person thereafter deriving
 " title as a purchaser for valuable consideration of the land
 " therein referred to, or of any part thereof, or of any
 " estate, right, or interest therein, from or under the person
 " whose title has been so declared) be deemed and taken
 " to have correctly declared the same; but save as
 " aforesaid, such declaration shall have no force or
 " effect whatever as to the title to the land comprised
 " therein" (*r*). But, by sect. 29 of the Act, the declaration of title did not affect land tax, succession duty, tithe rent-charge, rights of common, ways and the like, rents payable to the crown, franchises and the like, or public rights of way.

p) Sect. 7.*q*) Sect. 15.*r*) 25 & 26 Vict. c. 67, s. 24.

CHAPTER XXVI.

ON THE DEATH DUTIES ON LAND, AND OF THE ESTATE
DUTY IN PARTICULAR.

A DUTY under the name of legacy duty has for a very long time been payable by the law of England on the beneficial interests in personalty devolving upon the deaths of deceased owners, whether dying testate or intestate ; and regarding this duty more will be said when we come to treat of title by will and by administration (*a*), it being sufficient in this place to mention, that the legacy duty ranged, and (unless where otherwise hereinafter mentioned) still ranges from 1 to 10 per cent. Also, a duty under the name of probate duty has for a very long time been payable by our law on the total net amount of the personal estate of a deceased testator or intestate passing under his will or upon his intestacy,—and to that duty a further duty called account duty was latterly added,—both which duties were payable by the executor or administrator of the deceased, on his applying for probate of the will, or (as the case might be) for a grant of letters of administration to the personal estate of the deceased, as will also be more fully explained hereafter, in the chapter on title by will and by administration.

But as regards land (that is to say, real estate), no probate duty or account duty was ever payable ; but a

(*a*) Bk. II. pt. II. c. VII.

duty under the name of succession duty, and which corresponded (in essentials) with the legacy duty above mentioned, and was not at all like probate or account duty, was imposed in the year 1853, on the beneficial interests in land devolving on the death of the deceased landowner (called the predecessor) upon the persons then becoming entitled thereto, under the will, or upon the intestacy, of such deceased owner, the Act by which this succession duty was originally imposed having been the 16 & 17 Vict. c. 51, and which Act applied, and still applies, to all deaths which have happened since the 19th day of May, 1853, or which shall hereafter happen. And it will be convenient here to expound, with some little detail, the provisions of the Act in question, and of the few Acts which have in some few particulars amended it; and it will thereafter be convenient to consider, also, and with some greater detail, the provisions of the Finance Act, 1894 (57 & 58 Vict. c. 30), by which a new death duty has been created under the name of estate duty, and which new duty corresponds (in essentials) with the probate duty above referred to, which it supersedes; but the new duty extends not only to personal estate (on which alone probate duty and account duty were formerly chargeable), but also to real estate (which, as we have said, was theretofore exempt altogether from probate duty and from account duty).

Firstly, the *Succession Duty*.—This is a duty payable by the successor to real property, when the succession is on death, and the successor is (in effect) a volunteer, and not a purchaser for value; and it is payable also in respect of any increase of beneficial interest accruing or arising to the successor, through the cesser (upon death) of any annuity or other like charge on the real estate comprised in the succession. The duty varies according to the degree of consanguinity of the volunteer to the donor of the real estate; and is calculated according to a varying percentage on the value of the succession to the successor; and is

made payable by certain prescribed instalments,—the first of them becoming due and payable at the expiration of twelve calendar months from the time when the successor's title accrues in possession. The varying percentage at which the duty is, by the Act, appointed to be calculated appears by the following statement (*b*), namely :—

£1 per cent. on the value of the succession, where the successor is of the lineal issue or is a lineal ancestor of the predecessor ;

£3 per cent. on the value of the succession, where the successor is a brother or sister or a descendant of a brother or sister of the predecessor ;

£5 per cent. on the value of the succession, where the successor is a brother or sister of the father or mother of the predecessor or is a descendant of such a brother or sister ;

£6 per cent. on the value of the succession, where the successor is a brother or sister of the grandfather or grandmother of the predecessor or is a descendant of such a brother or sister ; and

£10 per cent. on the value of the succession, where the successor is in any other degree of collateral consanguinity to the predecessor, or is a stranger in blood to him.

And as regards the value of the succession, in the case of each successor, his beneficial interest (*i. e.*, his succession) is to be deemed to be of the value of an annuity equal to the annual value of the real estate comprised in his succession, such annuity being taken as continuing during his life or for any less period for which the estate is limited to him, and the value of such annuity is (for the purposes of the duty) ascertained according to certain tables set forth in a schedule to the Act.

And as regards the actual payment of the duty, it is, by the Act, appointed to be paid by eight equal half-yearly

(*b*) 16 & 17 Vict. c. 51, s. 10.

instalments, the first to be paid at the end of twelve months after the successor shall have become entitled (*scilicet*, in possession) to the beneficial enjoyment of the property, the seven remaining instalments being made payable at equal half-yearly intervals of six months each, to be computed from the day on which the first instalment was due and payable; and these rules as regards the ascertainment of the duty payable, and as regards the payment thereof, apply whether the successor shall be entitled for his life only or other such less estate as aforesaid, or shall be entitled in fee simple or in fee tail; but it is provided, that in case the successor shall die before all the instalments of duty fall due and become payable, the remaining instalments (*scilicet*, those not already fallen due and become payable) are to cease to be payable, when the succession then ends (*i.e.*, when the estate of the successor then determines); on the other hand, in the case of a successor whose estate does not so then determine, or who was competent to dispose by will of a continuing beneficial estate or interest in the land comprised in his succession, it is provided that the instalments remaining unpaid at his death, whether then already due and payable, or thereafter accruing due and payable, are to continue payable; and for this purpose they constitute a charge upon the land comprised in the succession, and this in exoneration of the other property of the deceased successor (*c*); so that there arises (in such case) a *double* succession duty, that is to say, the new successor becomes liable for his own new succession duty and also for the unpaid remnants of the old succession duty originally payable by his immediate predecessor.

And as regards estates and interests arising under powers of appointment and the exercise of such powers (being powers contained in deeds or other dispositions of property that take effect upon the death of anyone), it is provided that, in all cases of a general power of appoint-

ment, the donee of the power shall, in the event of his making any appointment thereunder, be deemed to be entitled, at the time of his exercising such power, to the real estate thereby appointed, and to be entitled thereto as to a succession derived from the donor of the power as the predecessor. On the other hand, in all cases where the power of appointment aforesaid is merely a special power (that is to say, is a power which the donee thereof cannot exercise for his own sole and exclusive benefit), it is provided, that the appointee who becomes entitled under any exercise of the power (and not, as in the former case, the donee of the power) shall be deemed to become entitled to the real estate appointed to him, as to a succession derived from the donor of the power as the predecessor (*d*). But the donee of the power, where (as in the case of a general power) he becomes chargeable with the duty, is not to be subjected to double duty, that is to say, he is not to be chargeable with duty in respect of the real estate appointed by him under such general power, and also with the duty payable on a succession in the same property taken by himself independently of the power; but in the case of such conjunction of general power with beneficial estate, he is to be allowed, off the duty payable by him as donee of the power, any duty he may have already paid in respect of his own independent beneficial succession (*e*).

These observations will suffice on the succession duty as originally imposed by the statute 16 & 17 Vict. c. 51,—there being, however, many specific provisions contained in that Act which are of too minute a character to be dealt with in this work: and the Act extends also to leasehold property (*f*) (although that is, strictly speaking, personal estate and not real estate), and extends also, in fact, to all personal estate whatever devolving upon death and under circumstances in which it is not liable to legacy duty (*g*).

(*d*) 16 & 17 Vict. c. 51, s. 4.

(*f*) 16 & 17 Vict. c. 51, s. 1.

(*e*) Ibid. s. 33.

(*g*) Ibid. ss. 29, 30.

The Succession Duty Act of 1853 has been recently amended, in some few particulars, by the 51 & 52 Vict. c. 8, s. 21, 52 & 53 Vict. c. 7, ss. 10—15, and 57 & 58 Vict. c. 30, s. 18; and the amendments so made (so far as it is convenient to refer to them specifically in this work) are shortly as follows: By the first of the three Acts, an additional succession duty of 10s. per cent. has been added to the succession duty when payable at the rate of 1% per cent., and an additional duty of 30s. per cent. has been added to the succession duty when payable at the rate of 3%, 5%, 6%, or 10% per cent.—By the second of the three Acts, certain provisions are made for the protection of purchasers and mortgagees against liability to the unpaid succession duty, where they were *bonâ fide* purchasers or mortgagees, and were without notice of the duty having remained unpaid; and this protection arises, in favour of such *bonâ fide* purchasers and mortgagees, after the expiration of twelve years (and, in certain cases, after the expiration of six years) from the happening of the succession.—By the third of the three Acts, but only, *semble*, in the case of successors competent to dispose of the real estate comprised in their succession, it is provided, that the value of the succession on which the succession duty is to be payable shall be the principal value of such real estate, *less* the estate duty imposed by that Act, and *less* certain expenses incident to the payment of such last-mentioned duty; and the principal value aforesaid is now to be ascertained in the same way as if it were being ascertained for the purposes of the estate duty; and the succession duty is now to be payable by the like instalments as by the Act are appointed for the payment of the estate duty thereby imposed: which consideration brings us to that duty.

Secondly, the *Estate Duty*.—The statute 51 & 52 Vict. c. 8, besides amending the Succession Duty Act, 1853, in the particulars above referred to, imposed also a new duty called the estate duty,—being a duty at the rate of 1% per cent., firstly, on all personal estate liable to probate duty

where the estate on which such duty was to be paid exceeded 10,000*l.*, or liable to account duty where the estate on which such duty was to be paid exceeded 10,000*l.*; and, secondly, on all real estate comprised in any succession and liable to succession duty where the estate on which such duty was to be paid exceeded 10,000*l.* But the duty so imposed was intended to be of a merely temporary character; and it is hereinafter referred to as the temporary estate duty, that being also the designation by which it is referred to in the Finance Act, 1894, already mentioned, being the Act under which the estate duty properly so called, and which we now proceed to consider, has been imposed.

By the Finance Act, 1894 (*h*), s. 1, estate duty is imposed, in the case of any death on or after the 2nd August, 1894, on all property, whether real or personal, passing on such death; and in every such case, the estate duty so imposed is in lieu of and supersedes the probate duty and the account duty respectively before referred to, and also the additional succession duty before referred to, and also the temporary estate duty before referred to; and also (but only in cases where it would have been payable at the rate of 1*l.* per cent.) the legacy duty aforesaid and the succession duty aforesaid.

This new estate duty, hereinafter called simply the estate duty, is payable on the principal value of the entire property passing on the death; and it is to be calculated according to a percentage varying with, and gradually increasing with the increase in, the amount of the principal value of the estate subject thereto, that is to say:—By sect. 17, the rate payable is 1*l.* per cent. when the principal value (being over 100*l.*) does not exceed 500*l.*; 2*l.* per cent. when the principal value (being over 500*l.*) does not exceed 1,000*l.*; and thereafter 3*l.* per cent. up to a principal value of 10,000*l.*, 4*l.* per cent. up to a principal value of 25,000*l.*, 4½*l.* per cent. up to a principal value of

50,000*l.*, 5*l.* per cent. up to a principal value of 75,000*l.*, 5½*l.* per cent. up to a principal value of 100,000*l.*, 6*l.* per cent. up to a principal value of 150,000*l.*, 6½*l.* per cent. up to a principal value of 250,000*l.*, 7*l.* per cent. up to a principal value of 500,000*l.*, 7½*l.* per cent. up to a principal value of 1,000,000*l.*, and 8*l.* per cent. on the principal value of every estate the principal value of which exceeds 1,000,000*l.*; so that, *e.g.*, an estate of the principal value of 300,000*l.* would pay an estate duty of 21,000*l.*, and an estate of the principal value of 3,000,000*l.* would pay an estate duty of 240,000*l.*, the latter amount of duty being (by 30,000*l.*) greater than ten times the former amount of duty, although the principal value of the latter estate is only ten times more than the principal value of the former estate,—this difference showing the principle of what is called a graduated death duty.

In order to ascertain the percentage payable, all the property passing on the death is thrown together and forms what is called an aggregate estate (sect. 4); and the property to be so aggregated (that is to say, the property passing on the death) consists of and comprises (roughly) all the property (real and personal) of the deceased, all general powers of appointment vested in him, all property which (being personal estate) would have been subject to the old account duty, or which (being real estate) would, if it had been personal estate, have also been subject to the last-mentioned duty,—and includes also, of course, any access of interest accruing on the death, by, *e.g.*, the cesser of an annuity or the like (sect. 2); and it matters not, in the general case, whether the property is situate out of the United Kingdom or not, but any duty payable, by the *lex situs*, on property abroad is to be deducted from the principal value of the property subject to estate duty (sect. 20). Of course, the estate duty does not attach, or extend, to property passing on the death of the deceased of which he was but a trustee for third parties or strangers, without having therein any continuing beneficial interest of his own (sect. 2, sub-

sect. 3); but trust property held by him, under trusts created by himself, must be at least a year old (that is to say, the trust-dispositions must be at least a year old) at his death, and must be absolute alienations of the property comprised therein, if they are to escape liability to duty (sect. 2, sub-sect. 3); moreover, *bonâ fide* purchasers for full consideration are exempt (sect. 3), although their purchases should have left a life estate outstanding in the deceased (their vendor); but this exemption is manifestly not intended to extend to the purchaser, from the reversioner or remainderman, of his reversion or remainder falling into possession on the death of the deceased. Certain pictures and the like, of an historical interest, bequeathed (in effect) to the nation, may be specially exempted (sect. 15); and the annuities and pensions granted by the Government of British India, and payable to the widows and children of deceased officers of that Government, are expressly exempted (sect. 15); and an advowson is only to be aggregated with the other property passing on the death of the deceased, if it be (in effect) sold, and then only the net sale proceeds are to be aggregated (sect. 15).

The parties required to pay the estate duty are as follows:—Firstly, as regards all that part and those parts of the aggregate estate which vest in the executor *virtute officii* (or, in the words of the Act, all the personal property, wherever situate, of which the deceased was competent to dispose at his death), the executor is required to pay the proportion of the estate duty thereon (sect. 6), together with interest thereon at the rate of 3 per cent. from the death down to the delivery of the Inland Revenue affidavit; but if such affidavit is not delivered within six months from the death, then the estate duty (this proportion of it) with interest thereon at 3 per cent. from the death up to the expiration of these six months becomes *duty in arrear* (sect. 6, sub-sect. 10), and thereafter carries interest at 4 per cent. (sect. 8, sub-sect. 10), that being the rate of interest payable, under the 31 & 32 Vict. c. 124, s. 9, on arrears of legacy duty. Secondly, as regards all the other

parts of the aggregate estate, the estate duty thereon (that is to say, the proportion of the duty attributable thereto) is required to be paid by the party accountable therefor (*i. e.*, by the beneficiary or his trustee in the case of personal property not constituting a succession, and by the successor or his trustee in the case of real property and also in the case of personal property constituting a succession) (sect. 8, sub-sect. 4); but as regards any of such last-mentioned properties (on which the duty would be payable by the party accountable therefor), the executor may pay the duty in respect of all parts of such property that are under his control as executor, and also (but only on the request of the accountable party) in respect of the other parts thereof (being the parts not under his control as executor): And in all this second group of cases, equally as in the first group of cases, the interest at 3 per cent. from the death, and (after the expiration of the six months from the death) at 4 per cent. is payable; but as regards real estate, the party accountable may (at his option) pay the duty thereon (the proportion attributable to the property comprised in the succession) by eight equal yearly instalments or sixteen half-yearly instalments, with interest at 3 per cent. from the expiration of twelve months from the death, at which last-mentioned date the first instalment of the duty becomes in that case due (sect. 6, sub-sect. 8), any instalment not paid on the due date becoming instantly *duty in arrear* and carrying 4 per cent. until payment; and (by sect. 18) this mode of paying the estate duty on real estate by instalments is made applicable also, for the future, to the payment of the succession duty properly so called of which we treated above (*scilicet*, where such last-mentioned duty still continues payable). And whereas the executor pays the estate duty on his delivery of the Inland Revenue affidavit, the accountable party (where he and not the executor is liable to pay it and pays it) pays it on delivery of an account setting forth the necessary particulars, which account is to be delivered (like

the Inland Revenue affidavit) within, at the latest, six months from the death of the deceased. And any alienee of an accountable party's interest, equally with the accountable party himself, is liable for the estate duty (sect. 8, sub-sect. 4) : and a rateable part of the estate duty, as regards all that part and those parts of the aggregate estate which do not vest in the executor *virtute officii* as aforesaid, is made a first charge on the property in respect of which it is leviable (sect. 9, sub-sect. 1) ; and presumably, therefore, this charge, if remaining unsatisfied at the date of any sale, will be paid out of the purchase money (sect. 6, sub-sect. 8 ; sect. 8, sub-sect. 10), just as the ordinary practice has been with unpaid succession duty,—and a purchaser or mortgagee will experience some difficulty in satisfying the Inland Revenue Commissioners, that he is entitled (within sect. 8, sub-sect. 18) to exemption from liability to the estate duty, by reason of his being a *bonâ fide* purchaser or mortgagee without notice.

The Finance Act contains also divers provisions of an extremely useful and practical character for raising the estate duty, and for giving limited owners and others who pay the whole duty the benefit of the charge for duty which (if the duty were unpaid) would subsist and continue to subsist against the property itself (sect. 9),—these provisions applying, of course, only to the estate duty (the proportion thereof) which is payable by the accountable party as contradistinguished from the executor ; and the executor paying any estate duty which he is not (by the Act) required as such to pay, is equally entitled to the benefit of that charge (sect. 9, sub-sect. 4). The Act contains also provisions for the return of estate duty when too much has been paid, and for the payment of further duty when too little has been paid, in the first instance ; and provisions for postponing payment on terms, in cases in which the whole duty cannot, without a great sacrifice or hardship to the estate, be paid at once ; and provisions for the commutation of the duties on remainders, reversions, and

other future interests (all of which are, in the Act, called *interests in expectancy*) (sect. 12), and for the payment of one lump composition duty where the interests are complicated (sect. 13); and for the granting of certificates by the commissioners to the effect that the duty (or, as the case may be, the rateable proportion thereof) has been paid (sect. 11).

Besides the estate duty, the Finance Act, 1894, by sect. 5, imposes a *further estate duty*, in the Act called *settlement estate duty*; and (by sect. 17) fixes one uniform rate of 1*l.* per cent. for this further estate duty; but the settlement estate duty is only payable in the cases following, and only once during (in effect) the continuance of the settlement, that is to say:—

Firstly, where the property is settled by the will of the deceased himself;

Secondly, where the property passing on the death of the deceased so passes under some old and continuing settlement (sect. 5, sub-sect. 1): and of course,—

Thirdly, under all settlements newly constituted after the commencement of the Act (*i.e.*, on or after the 2nd August, 1894) (sect. 21, sub-sect. 1).

But as regards, firstly, property settled by Act of Parliament or royal grant, in such manner as that the beneficiary cannot aliene it, the estate duty is payable, but not the further estate duty; and such settled property is, for the purpose of such estate duty, to be an estate by itself, and is not to be aggregated with any other property passing on the death of the deceased (sect. 5, sub-sect. 5).

And as regards, secondly, small estates, when the property (real or personal) on which the estate duty is payable does not exceed 1,000*l.* in value, it is made to form (for the purposes of the estate duty) an estate by itself, and is not aggregated with the other property (if any) passing on the death of the deceased; and the estate duty, being paid on such estate by itself, supersedes not merely the settlement estate duty, but the legacy and succession

duties also (sect. 16, sub-sect. 3); and estates not exceeding 300*l.*, go free of all duty on payment of 30*s.* only; and estates not exceeding 500*l.* go free of all duty on payment of 50*s.* only.

And in conclusion upon the Finance Act, we will observe that, among other provisions for the due and fair ascertainment of the principal value on which the estate duty is to be paid, the Act contains the following provision (sect. 7, sub-sect. 5), namely, that the principal value of any property shall be estimated to be the price which (in the opinion of the Commissioners) such property would fetch, if sold in the open market at the time of the death of the deceased,—a provision which may possibly prove helpful to persons succeeding to large landed estates of an agricultural character, so long (at least) as the value of that species of property continues to be so depressed, and the market for the sale thereof so stagnant, as it has for some long time been, and is at the present moment; and the Act also otherwise shows a reasonable leniency towards this class of successors.

The whole law relative to the rights of property in things real (exclusive of what relates to their violation, and to the remedies in such case provided) has now come in due order under discussion, and the second part of the present book of these Commentaries—that which relates to Things Personal—will be entered upon in the next volume.

The subject which has thus far employed our attention is of very extensive use and importance, but, it must be confessed, not very attractive at the first aspect. [To say the truth, the vast alterations which the doctrine of real property has undergone from the Conquest to the present time; the infinite determinations upon points that continually arise, and which have been heaped one upon

[another for so many centuries, and the multiplicity of Acts of Parliament which, without much method, have amended, or sometimes only declared, the common law,—these causes have made the study of this branch of our national jurisprudence at once laborious and intricate. It has been our endeavour principally to select such parts of it as were of the most general use, where the principles were the most simple, the reasons of them the most obvious, and the practice the least embarrassed. Yet it is not to be presumed that we have always been thoroughly intelligible to such readers as were before strangers even to the very terms of art of which we have been obliged to make use, though whenever those have first occurred, we have generally attempted a short explication of their meaning. These are indeed the more numerous on account of the different languages which our law has, at different periods, been taught to speak: the difficulty arising from which will insensibly diminish by use and familiar acquaintance. And therefore we shall close this branch of our inquiries with the words of Sir Edward Coke,—“albeit the student shall not, at any one day, do what he can, reach to the full meaning of all that we have laid down, yet let him no way discourage himself, but proceed; for on some other day, in some other place,” (or perhaps upon a second perusal of the same), “his doubts will be probably removed” (*i*).]

(*i*) Proeme to 1 Inst.

END OF THE FIRST VOLUME.

INDEX

TO THE FIRST VOLUME.



A.

ABANDONMENT.

- of easement, 638.
- of property, 160.

Abeysance.

- of fee. 231, 317, n.
- of freehold, 232.

Abjuration, 143.

Abolition,

- of fines and recoveries, 245, 519, 533.
- of colonial slavery, 109.
- of military tenures, 202.

Abridgments (or digests), 56.

Absolute fee simple, 233.

Absque disparagatione, 193.

Abstract of title, 644.

Abuse of office, 291.

Accession of interest, 334.

Accessorium,

- sequitur principale, 307, 626.

Account duty, 694.

Accountable party. 703.

- account by, *ib.*

Accumulation of income, 516, 517.

Acknowledgment,

- by mortgagee of mortgagor, 298.
- of married women, 448, 539.
- of vassalage, 175.
- of right to production, 642.

Acreage rent, 668.

Active trusts, 357.

Act of ownership, 284.

Act of the parties, 335.

Act of Parliament,

- how cited, 67, n.
- local and personal, 68.
- public and private, 67.

Actions,

- on statutes, 76.
- real, 437.

Actores fabulæ, 529.

Actus Dei,

- nemini facit injuriam, 253.

Admeasurement,

- of dower, 265.

Admiralty,

- jurisdiction of, 48, 117.

Admittance.

- to copyhold, 581, 584.

Ad ostium ecclesiæ,

- dower, 263, 270, n.

Ad quod damnum,

- writ of. 428.

Adultery,

- effect of, on dower, 267.

Advowsons, 338.

Æquitas sequitur legem, 361.

Africa,

- Acts relating to, 105, n.

After-acquired lands, 547, 556.

After possibility of issue extinct, tail estate, 256, 531.

Aggregate corporation, 345.

Aggregate estate, 701.

- Agreement, 480—see **CONTRACT**; **LEASE**.
- Agricultural Holdings Act (1875), 482.
- Agricultural Holdings Act (1883), 482.
- Agriculture, Board of, 591, 603.
- Aids,
in knight service, 176.
in seage, 194, 206.
parliamentary, 165.
- Air,
right to, 161.
- Alderney, 100.
- Alfred,
his laws, 44.
- Alienation,
in general, 439 *et seq.*
in mortmain, 426, 431 *et seq.*
by corporations, 444.
to corporations, 426 *et seq.*
by infants, 447, 450.
by lunatics, 446, 450.
by married women, 448, 539.
by particular tenants, 436.
by tenant in tail, 238.
in case of copyholds, 219, 581.
fines on, 177, 219.
forfeiture by, 308, 436.
licence for, 198, 593, 653—see **LICENCE**.
of settled estates, 247, 260, 271, 450, 636 *et seq.*
restraint upon, 442.
- Aliens, 136, n.
can now hold real property, 449.
can now take by descent, 411.
naturalization of, 412.
tracing descent through, *ib.*
- Allodial property, 173, 185, 228.
- Allodium, 173, 227—see **ALLODIAL PROPERTY**.
- Allotments,
under Inclosure Acts, 602.
under Small Holdings Act, 687.
for labouring classes, 431, n., 688, n.
- Alluvion, 422.
- Alterations,
in deeds, 467.
in wills, 550, 553.
- Ambiguity,
in a deed, 470.
in a will, 471, 554.
latent and patent, 470.
- Ambulatory,
character of will, 543.
- American colonies,
Acts relating to, 105, n.
revolt of, 104.
- Ancestors, 227, 385.
- Anglo-Saxon Laws, 45.
- Animals *feræ naturæ*, 161, 611.
- Animo revocandi, 550, 553.
- Annuities, 617, 620.
- Antient demesne, 220.
- Antient freeholds, 231, 657.
- Antient lights, 607, 636.
- Antient monuments, 431, n.
- Antigua,
Act relating to, 106, n.
- Apparent heir, 360.
- Appeal,
from colonies, 107.
to Privy Council, *ib.*
to House of Lords, 97.
- Appellate Jurisdiction Act (1876), 97.
- Appendant, 597—see **COMMON**.
- Appointment, 511, 512—see **POWER**.
- Apportionment,
of condition, 294, 651.
of common, 625.
of rent, 624, 651, 671.
- Apportionment Act (1870), 256, 624.
- Apprenticii ad legem, 15.
- Appropriation,
of tithes, 119.
- Approving common, 601.
month's notice before, 602.
- Appurtenances, 457, 555, 626.
- Appurtenant, 598—see **COMMON**.
- Arable land, 597.
- Arbitrary fines, 219.
- Arbitrary tithes, 119.
- Archbishop's province, 118.

- Archdeaconry, 118.
 Aristocracy,
 government by, 28.
 Arms,
 right to carry, 152.
 training to the use of, 153.
 Army,
 Annual Acts, 153, n.
 Arrangement, deeds of,
 registry of, 688.
 Articles of union,
 with Ireland, 96.
 with Scotland, 86.
 Artisans' dwellings, 664.
 Ascending line,
 formerly excluded from inheriting,
 385.
 may now inherit, *ib.*
 As of fee, 229.
 As of freehold, 249.
 As of right, 63—see PRESCRIPTION.
 Assensu patris, 264.
 Assent, Royal, 70.
 Assets,
 in equity, 403, 405, 579.
 Assignment,
 of contingent interests, 443.
 of dower, 264.
 of estate at will, 284.
 of lease, 491.
 of right of entry, 443.
 of satisfied terms, 286, 287.
 conveyance by, 491.
 distinguished from underlease,
 492.
 Assigns, 233.
 Assize,
 judges of, 130.
 commissioners of, *ib.*
 Assize of arms, 196.
 Assize, rents of, 620.
 Assurances, common, 472.
 Atholl, Duke of,
 rights of, in Isle of Man, 99.
 Attainder,
 nature and effect of, in general,
 143, 199, 413 *et seq.*, n.
 on alienation, 444.
 effect of, on dower, 262.
 of trustee, 417.
 Attendant term, 286, 287.
 Attestation,
 of a deed, 466.
 of a will, 551.
 Attorney to take admittance, 585,
 586.
 Attornment, 440, 440, n., 441, 479, 500.
 Augmentation,
 of poor livings, 431.
 Aula regis, 14.
 Australasia,
 defence of, 105, n.
 federation of, Act for, *ib.*
 Australian colonies,
 Acts relating to, 105, n.
 Autre droit,
 land held in, 309.
 Autre vie,
 tenant pur, 249.
 will of estate pur, 548.
 A verbis legis,
 non recedendum est, 72.
 Averium, 578.
 Avoidance,
 of a deed, 467.

B.

 Bacon,
 references to, 54, 74, 511.
 his abridgment, 56.
 Bail,
 excessive, 148.
 Bailiffs,
 of hundreds, 125.
 Bailiwick, 609.
 Banishment, 150.
 Bankrupt trustee, 361, n.
 Bankruptcy,
 of tenant in tail, 245.

- Bar,
 of dower, 265.
 of estate tail, 242, 533.
 of quasi-entail, 421.
- Bar students, 17.
- Barbula,
 Act relating to, 106, n.
- Bare authority, 226.
- Bare possibility, 225.
- Bare trustee, 363.
- Bargain and sale, 348, 499.
- Barristers, 17.
- Base fee, 234, n., 238, 525, 536.
 enlargement of, 536.
- Base services, 186.
- Bastard,
 cannot be heir, 409.
 cogné, may be heir, 410.
- Basutoland, 105, n.
- Battery, 146.
- Beasts of forest, &c., 611.
- Bechuanaland, 105, n.
- Bed of river, 616.
- Bedfordshire, 682.
- Benchers, 17.
- Benefice, 173.
- Beneficia, 173, n.
- Beneficial owner, 641.
- Benevolences, 166.
- Bequests, 544 *et seq.*—see DEVISES.
- Berwick-upon-Tweed, 90, 90, n.
- Bishoprics,
 English, 118.
 colonial, 102, n.
 Indian, 112.
 suffragan, 118, n.
- Bissextile year, 274.
- Black mail, 621.
- Blood,
 of the purchaser, 372, 374.
 whole and half, 391, 393.
 inheritable, 408.
 corruption of, 413 *et seq.*
- Board of Agriculture, 591, 603.
- Board of Control, 111.
- Bodily rights,
 how protected, 141.
- Body corporate, 126, 345, 444 *et seq.*
- Bombay,
 Bishop of, 112.
- Bombay Civil Fund, 115, n.
- Borough,
 definition of, 127.
 municipal, 126, n.
 parliamentary, 127, n.
- Borough English, 59.
 tenure by, 209.
- Borough rate, 131, n.
- Borsholder, 126.
- Botes,
 by tenant for life, 251.
 by tenant for years, *ib.*
- Boundaries,
 of parishes, 120, 121.
- Bracton, references to, 55, 186.
- Breach of condition, 293.
- Breach of covenant, 293, 461, 481, 492.
- Break in descent, 402.
- Brehon law, 91, 92.
- Brevia testata, 466.
- Bridgman,
 references to, 321.
- British Columbia,
 Acts relating to, 105, n.
- British constitution, 30.
- British Honduras,
 Acts relating to, 105, n.
- British Islands, 97.
- British Kaffraria,
 Acts relating to, 105, n.
- British Museum, 435.
- British possessions, 101.
- British Settlements, 106, n.
- British subjects, 136.
- Britons,
 laws of antient, 43.

Brooke's Abridgment, 56.

Brothers,
descent between, 392, 394, 412.

Building leases, 667.

Burgage,
tenure in, 209.

C.

Caicos Islands,
Act annexing, 106, n.

Calcutta,
Bishop of, 112.

Calendar month, 274.

Call to the bar, 17.

Canada,
Acts relating to, 105, n.

Cancelling,
deed, 467.
will, 553.

Canon law, 7, 10, 40.
origin and growth of, 40.
sources of, *ib.*
obligation of, 42, 49.

Canons of 1603..42.

Canons of Convocation, 42.

Canons of descent,
prior to 1st January, 1834..369, n.
since 1st January, 1834..369 *et seq.*

Capacity,
to purchase or convey, 444—see
ALIENATION ; CONVEYANCES.

Cape of Good Hope,
Acts relating to, 105, n.

Capita,
succession per, 387, 388.

Capital moneys, 674.

Capital punishment, 145.

Capite,
tenants in, 185, 196, 207.

Cart-bote, 251.

Carucata terræ, 188, n.

Catalla, 272.

Cayman Islands,
Acts relating to, 106, n.

Central Criminal Court, 130, n.

Certain services, 186.

Certainty.
of custom, 64.

Certificate of acknowledgment, 540.
of searches, 690.
of redemption, 650.

Cesser, 286.

Cession,
colonies gained by, 101.

Cestui que trust, 357.
use, 348.
vie, 325.

Chancery,
court of,
England, 80.
Ireland, 95.
Lancaster, 133, n.
Durham, *ib.*
inns of, 16, n.

Channel Islands, 97.

Channel of descent, 412.

Charge for duty, 704.

Charge for expenses,
of enfranchisements, 594.

Charge in equity, 361.

Charging real estate,
with debts, 403, 405.

Charitable uses, 431 *et seq.*

Charity Commissioners, 435.

Charity, rents of, 623.

Charta de Forestâ, 613.

Charta, Magna, 146, 151, 165, 184,
193, 200.

Charter or deed, 453.

Chase, 615.

Chattels,
personal, 272.
real, *ib.*

Chattels real,
distinguished from freeholds, 273
et seq.
varieties of, 273.
estate for years, *ib.*
from year to year, 280.
at will, 283.
at sufferance, 284.
by statute merchant, 301.
by statute staple, 302.
by elegit, *ib.*

- Chester,
 county palatine of, 131.
 Chief rents, 620.
 Child in womb, 141, 320, 515.
 Children, rights of, 162.
 China,
 Acts relating to, 105, n.
 Chirograph, 454.
 Chivalry,
 tenure by, 187.
 abolition of, 202.
 Church
 of England, 88, 89.
 of Ireland, 96, n.
 of Scotland, 88.
 Churches, parish, 118, 119.
 Churchyards, 429.
 Circuits, 130.
 City,
 definition of, 126.
 Civil death, 143.
 Civil government,
 origin of, 26.
 varieties of, 28.
 in England, 30.
 sovereign power in, *ib.*
 Civil injury,
 distinguished from crime, 140.
 redress for, *ib.*
 Civil law, 7, 10, 38.
 origin and growth of, 38.
 sources of, 39.
 obligation of, 49.
 Clementine Constitutions, 40.
 Clergy, 10.
 Clerks, 9.
 Close rolls, 568.
 Close writ, 568—see *Writ*.
 Code,
 of Justinian, 39.
 of Theodosius, *ib.*
 new, *ib.*
 Codicil, 544.
 Cognizance,
 fine sur, &c., 522.
 Cognizee,
 of a fine, 522.
 Cognizor,
 of a fine, 522.
 Coke, 15, 55.
 his Institutes, 57.
 Coke upon Littleton, 57.
 Collateral inheritance, 391.
 Collateral warranty, 460.
 College leases, 435.
 Colonial Laws,
 Validity Act, 104, 107.
 Colonies,
 acquisition of, 101.
 Acts relating to the, 104, 105, n,
 108, n.
 appeals from, 107.
 bishops in, 102, n.
 church in, *ib.*
 governors of, 102, 106.
 law of, 101.
 legislators of, 102.
 legislatures of, 102, 108.
 slavery in, 109.
 making of, 159.
 Comites, 173.
 Commissioners,
 copyhold, 591.
 inclosure, 603.
 Common, 596.
 appendant, 597.
 appurtenant, 598.
 because of vicinage, *ib.*
 in gross, 599.
 by prescription, 634.
 improvement of, 601, 602.
 extinguishment of, 604.
 inclosure of, 602.
 of estovers, 601.
 of pasture, 64, 597.
 of piscary, 600.
 of shack, 599.
 of turbary, 600.
 for cattle levant and couchant,
 ib.
 sans nombre, *ib.*
 without stint, *ib.*
 in the soil, 601.
 meadows, 599.
 Common assurances, 452.
 Common law, 9, 43, 79.

- Common Pleas,
 fixed at Westminster, 13.
 of Durham, 133.
 of Lancaster, *ib.*
- Common possibility, 318.
- Common recovery, 242, 428, 526 *et seq.*
- Common, tenancy in, 339.
- Common towns, 126.
- Common vouchee, 528.
- Commonable beasts, 597.
- Commons Preservation Act (1876), 604.
- Communion of goods, 155, 156.
- Commutations of copyholds,
 general, 591.
 by apportionment, 592.
 particular, 591.
- Competency of witness, 550, 552.
- Composition,
 for heriots, 579.
- Compulsory,
 admittance, 585.
 custom is, 64.
 purchase, 165.
 enfranchisements, 594.
- Computation of time, 274.
- Comyns' Digest, 56.
- Concessit,
 fine sur, 523.
- Conclusion,
 of a deed, 462.
 of a fine, 522.
- Concord,
 of a fine, 521.
- Condition,
 breach of, 293.
 continuing, 294.
 estate upon, 290.
 express, 291.
 illegal, 294.
 implied, 290.
 impossible, 294.
 in deed, 292, 459.
 precedent, 291, 295.
 repugnant, 294.
 subsequent, 291, 295.
 waiver of, 295.
- Condition, Estates upon,
 what are, 290.
 implied, *ib.*
 expressed, *ib.*
- Condition, Estates upon—*continued.*
 condition subsequent, 291, 295.
 impossible, 294.
 precedent, 291, 295.
 concurrent, 292.
 forfeiture of, 295.
 of mortgagees, 296 *et seq.*
- Conditional fee, 234—see FEE.
- Conditional fee at common law, 234.
- Conditional limitations, 292 — see
 LIMITATION, CONDITIONAL.
- Conditional surrender, 586—see SUR-
 RENDER.
- Confirmatio chartarum, 195.
- Confirmation,
 deed of, 488.
 implied, *ib.*
- Conflict of customs, 65.
- Conies, 615.
- Conqueror, 366—see CONQUEST.
- Conquest,
 colonies gained by, 101.
 of Ireland, 91.
 of Wales, 83.
 technical meaning of, 366.
- Conscience,
 a sanction of laws, 36, 37.
- Consideration, 468.
- Consistent,
 customs, 65.
- Consolidated regulations,
 of Inns of Court, 17, n.
- Constable, high, 128.
- Constitution, English, 30, 147.
- Constitutions,
 legatine, 41.
 provincial, *ib.*
- Construction,
 of customs, 65.
 of deeds, 469.
 of devises, 554.
 of royal grants, 570.
 of statutes, 71.
- Consuetudo,
 et lex Angliæ, 258, n.
- Contingency,
 with a double aspect, 317.

- Contingent interest,
 alienation of, 443.
- Contingent remainder,
 nature of, 316.
 examples of, *ib.*
 with double aspect, 317.
 rules regulating, 318.
 destruction of, 320.
 preservation of, 320, 321.
 trustees to preserve, 321.
 in trust estates, 361.
- Contingent Remainders Act (1877),
 323, 506, 510.
- Contingent uses, 351.
- Continual claim, 477.
- Continuance,
 of custom, 63.
- Contract,
 heir's liability on specialty, 403.
 merger of simple, 453.
 for sale, 644.
- Contract, social, 27, 28—see GOVERN-
 MENT.
- Contra pacem,
 domini, 132.
 regis, *ib.*
- Control, Board of, 111, 114.
- Conventional estates, 249.
- Conveyances,
 generally, 472 *et seq.*
 at common law, 472.
 by aliens, 449.
 by attainted persons, 444.
 by corporations, *ib.*
 by idiots, 446.
 by infants, 447.
 by lunatics, 446.
 by married women, 448, 539.
 by matter of record, 472, 565.
 by statute law, 565.
 by tenants in tail, 518 *et seq.*
 by the crown, 567.
 in pais, 472.
 innocent, 514.
 of copyholds, 581.
 origin of, 161.
 practice as to preparing, 456, n.
 to uses to bar dower, 268.
 under the Statute of Uses, 495.
 under Conveyancing Acts, 639.
 under Settled Land Acts, 656.
- Conveyancing Act (1881), 232, 241,
 288, 294, 298, 299, 364, 513,
 622, 628, 639 *et seq.*
- Conveyancing Act (1882), 288, 513,
 655, n.
- Conveyancing Act (1892), 651, 652,
 653.
- Conveyancing, system of, 472.
- Coparcenary, 335.
- Copy,
 of court roll, 216.
- Copyhold Acts, 590.
- Copyhold Commissioners, 591 — see
 COMMISSIONERS.
- Copyhold tenure,
 origin of, 211.
 no new creation of, 217.
 incidents of, 218, 219.
 commutation of, 591.
 extinguishment of, 219.
- Copyholders, formerly villeins, 216.
- Copyholds,
 admittance to, 581, 584.
 alienation of, 581.
 assets, 579.
 commutation of, 591, 592.
 descent of, 218, 574, 585.
 devise of, 583, 584.
 dower in, 575.
 enfranchisement of, 580, 593.
 equitable interests in, 590.
 estate tail in, 575.
 execution against, 579.
 extinguishment of, 587.
 fines, heriots, &c. in, 576.
 forfeiture of, 198, 576.
 for life or years, 574.
 freebench in, 575.
 liability of, to debts, 579.
 licence to demise, 581.
 mortgage of, 586.
 of inheritance, 218, 574, 588.
 of married woman, 589.
 partition of, 592.
 quit rents in, 620.
 rents of assize in, *ib.*
 surrender of, 581, 584.
 title to, 580.
 waste in, 576.
- Corn, 253.
- Cornage, tenure by, 200.
- Corodies, 596.
- Corporate counties, 135.

- Corporations, 126.
 - aggregate, 345.
 - sole, 345.
 - municipal, 126.
 - purchases by, 425 *et seq.*
 - alienations by, 444 *et seq.*
- Corporeal hereditaments, 170.
- Corpus juris,
 - canonici, 38.
 - civilis, 40.
- Corruption of blood, 199, 413 *et seq.*
- Council of Governor-General in India, 112.
- Council of India, 114.
- Council of Legal Education, 17.
- Counsel, 14, 16.
- Count, 128.
- Counterpart, 455, 667.
- Counties, 125, 129.
 - corporate, 135.
 - palatine, 131.
- County council, 687.
- County courts, 129.
- County of a town, 135.
- County palatine, 131—see COUNTIES.
- County rate, 130.
- Court, Inns of, 14, n.—see INNS.
- Court,
 - of directors, 112.
 - of proprietors, 113.
- Courts,
 - baron, 212.
 - chancery,
 - England, 80.
 - Ireland, 95.
 - customary, 217.
 - of wards and liveries, 191.
 - of great session in Wales, 84.
 - of the counties palatine, 133.
 - of King's Bench,
 - England, 45.
 - Ireland, *ib.*
 - of session of Chester, 133.
- Covenant to stand seised, 348, 498.
- Covenant, writ of, 520.
- Covenants,
 - in a conveyance, 461.
 - in a lease, 481, 492.
 - implied, 461, 641.
 - running with land, 461, 481, 492.
 - waiver of, 295.
- Credibility of witness, 550, 552.
- Creditors,
 - simple contract, 404.
 - specialty, 403.
- Crime,
 - distinguished from civil injury, 140.
- Croke's Reports, 55.
- Cross,
 - signing by, 463, 464.
- Cross remainders, 342.
 - implied in wills, 555.
- Crown,
 - succession to, 382, 396.
 - grants by, 567 *et seq.*
 - forfeiture to, 414, 415.
 - lands, 572.
- Cujus est divisio,
 - alterius est electio, 338.
- Cujus est solum,
 - ejus est usque ad cœlum, 169.
- Curialitas, 258, n.
- Curtesy,
 - tenant by the, 257.
 - in copyholds, 575.
- Custom and prescription, 629.
- Customary court, 217, 592.
- Customary dower, 575—see FREEBENCH.
- Customary freehold, 222.
- Customary heriot, 576, 577—see HERIOT.
- Customs,
 - source of unwritten law, 43, 45.
 - must be of immemorial antiquity, 47.
 - some derived from Civil Law, 48.
 - some derived from Canon Law, *ib.*
 - are either general or particular, 50.
 - general, examples of, *ib.*
 - validity of, 51.
 - expression of, *ib.*
 - proof of, *ib.*
 - old forgotten statutes, 57, 58.

Customs—*continued*.

- particular, examples of, 58.
- origin of, *ib*.
- varieties of, 59.
- proof of, 61.
- validity of, 62.
- quasi-easements, claimed by, 629.
- See BOROUGH ENGLISH; GAVEL-KIND.

Customs of London, 59, 61—See LONDON, CUSTOMS OF.

Customs of merchants, 60, 61.

Cyrographum, 454.

D.

Dane-Lage, 45.

Date of deed, 465.

Day,
computation of, 275.
fractions of, *ib*.

Deanery, rural, 118.

Death,
civil, 143.
natural, *ib*.

Death duties,
on land, 694 *et seq*.
return of, 704.
postponement of, *ib*.
commutation of, *ib*.
composition for, 705.

Debts,
simple contract, heir's liability on, 404.
specialty, liability of the heir on, 403.
payment of, out of realty, 405.
out of *pur autre vie* estates, 421.
in bankruptcy, 406.
in case of copyholds, 579.

Deceit, 589.

Decennaries, 125.

Declaration of Title Act (1862), 692.

Declaration,
in bar of dower, 268.

Declaratory,
law, 33.
statutes, 69.

Declaring uses,
of fine or recovery, 533.

Decree,
elegit upon, 303, n.

Decretals, 40.

Decretum Gratiani, 40.

Dedi et concessi, 176, 188.

Dedimus potestatem,
writ of, 521.

De donis
statute, 235, 237, 518.

Deed,
acknowledgment of, 448, 539.
alteration in, 467.
ambiguity in, 470, 471.
attestation of, 466.
avoidance of, 467.
cancelling of, *ib*.
conclusion of, 462.
condition in, 459.
consideration of, 468.
construction of, 469.
counterpart of, 455.
covenants in, 461.
date of, 465.
definition of, 453.
delivery of, 465.
discharge of, 467.
disentailing, 533.
execution of, 465.
habendum in, 457.
inconsistent clauses in, 471.
indented, 454.
in general, 453 *et seq*.
inter partes, 456.
of defeasance, 493.
of exchange, 482.
of partition, 484.
of release, 484 *et seq*.
original and counterpart, 455.
or escrow, 465.
poll, 455.
premises in, 456.
reading of, 462.
recitals in, 457.
reddendum in, 458.
registration of, 680 *et seq*.
release of, 467.
requisites of, 455 *et seq*.
sealing of, 463.
signing of, *ib*.
stamps on, 455, n.
tenendum in, 458.
to declare or lead uses, 532, 533.

- Deed—*continued*.
 voluntary, 468.
 warranty in, 459.
 without consideration, 468.
 witnesses to a, 466.
 written or printed, 455.
- Defeasance, 493.
- Deforciant, 521.
- Dehors, evidence, 469.
- De la plus belle,
 dower, 264, n.
- Delivery,
 of a deed, 465.
- Demandant, 529.
- De Mercatoribus, statute, 301.
- Demesne lands, 212.
- Demesne, seisin in, &c., 229.
- De Minimis, 423.
- Demise, 479—see LEASE.
- Demi-vills, 125.
- Democracy, 28.
- Dependencies,
 colonial, 101.
- Deposit,
 of title deeds, 297.
- Derby,
 earls of, 99.
- Dereliction,
 lands acquired by, 422.
 property lost by, 160.
- De religiosis, statute, 426.
- Derivative conveyances,
 distinguished from primary, 484.
- Descendants, 387, n.
- Descent,
 origin of, 161.
 in feuds, 178.
 in freeholds, 368 *et seq.*
 in copyholds, 218, 574, 585.
 breaking the, 402.
 before Inheritance Act, 369, n.
 since Inheritance Act, 369 *et seq.*
 tables of, 370.
 special cases of, 397.
- Descent, canons of,
 from purchaser, 370.
 preference of males, 378.
 primogeniture, 380.
 representation, 382.
 lineal ancestors, 385.
 paternal preferred to maternal,
 388.
 half-blood admitted, 391.
 from last person entitled, as quasi
 purchaser, 398.
 as regards trust estates, 359, 363.
- Descent, customs of, 218, 368, 574, 585.
- Descent or purchase, 366, 367.
- Detached parts of counties, 127.
- Determination,
 of estates at will, 283, 284.
- Devisee,
 liability of, for debts, 403, 404.
- Devises,
 generally, 543 *et seq.*
 fraudulent, 404.
 history of, 544.
 New Wills Act, 547 *et seq.*
 solemnities of, 549.
 construction of, 554.
 operation of, 545, 562 *et seq.*
 by married women, 548, 549—see
 EXECUTORY DEVISE; LAPSED DE-
 VISE; RESIDUARY DEVISE; DYING
 WITHOUT ISSUE; COPYHOLDS.
- Digest, Justinian's, 39.
- Dignities,
 nature of, 596.
 descent of, among females, 382.
- Diocese, 118.
- Directory part,
 of law, 33.
- Disabling statutes, 69.
- Disafforestation, 613.
- Disceit,
 writ of, 589.
- Discharge,
 of deed, 467.
- Disclaimer,
 of estate, 451.
 by married woman, 449.
 none by heir-at-law, 451.
 of tenure, 438.
 of powers, 513.

- Discontinuance,
of estate tail, 437, 526.
- Disentailing deed, 533 *et seq.*
- Disparagement,
of ward, 192, 193.
- Dispensing with husband, 541.
- Displacement,
of reversion, 308.
of remainder, 315.
- Disseisin, 306.
- Distress, 618, 621.
- Districts, ecclesiastical, 124.
- Disturbance,
of fair, ferry, or market, 610.
- Disuse, 637.
- Divesting,
of reversion, 308.
of remainder, 315.
- Divine law, 21.
- Divine service,
tenure by, 222.
- Divisions,
of counties, 129, n.
- Divorce,
effect of, on dower, 262, 265.
- Doctor and Student,
treatise known as, 56.
- Dom-Boc,
of Alfred, 44.
- Domesday Book, 220.
- Dominica,
Acts relating to, 106, n.
- Dominium, directum, 228.
- Dominus Hiberniæ, 92.
- Don grant et render, fine sur, 523.
- Donation, 176.
- Donis, statute de, 235, 237, 518.
- Dos (or dower), 261.
- Dos rationabilis, 269.
- Dotalitium, 261.
- Double aspect, 317.
- Double possibility, 318.
- Double succession duty, 697.
- Double value,
of marriage, 192.
- Double voucher, 528.
- Dower,
at common law, 260, 264.
by particular custom, 261.
in copyholds, 575.
assignment of, 264.
alterations in law of, 268.
ad ostium ecclesiæ, 263.
de la plus belle, 264, n.
ex assensu patris, 264.
out of what hereditaments, 262.
how barred, 265.
- Dower Act (3 & 4 Will. IV. c. 105)
(1833), 268.
- Dower, action of, 265.
- Dowress,
not within Settled Land Act
(1882), 271, 657.
- Druids, 43.
- Duchy of Lancaster, 131.
- Duplicate or counterpart, 667.
- Durante viduitate, 250, 292.
- Duress,
of imprisonment, 142, 150.
per minas, 142.
- Durham,
county palatine of, 131.
Court of Pleas of, 133.
university of, 17.
- Durities, 142.
- Duties, 138.
- "Duty in arrear," 702, 703.
- Dyer's Reports, 55.
- "Dying without issue,"
in a devise, 561.
- E.
- Easement, 636.
creation of, 658.
- East India Company,
constitution of, 110.
dissolution of, 113, n.
- East Indies, 110.
- Ecclesiastical courts, 48.

- Ecclesiastical Divisions, 118.
 Ecclesiastics,
 alienation by, 444, 445.
 Edgar, king,
 his laws, 45.
 Edward the Confessor,
 his laws, 45, 183.
 Ejectment,
 action of, 306.
 Elegit,
 estate by, 302.
 writ of—
 against freeholds, 303.
 against copyholds, 579.
 Elopement and adultery, 265, 267.
 Ely, bishop of, 135.
 Ely, isle of, 135.
 Emblements, 253, 279, 283.
 Empress of India,
 title of, 115.
 Enabling statutes, 69.
 Enclosure commissioners, 603.
 Endowment, 260 *et seq.*—see DOWER.
 Enfranchised land,
 sale of, 644.
 Enfranchisement,
 of copyholds, 580, 593, 594.
 voluntary, 593.
 compulsory, 594.
 expenses, charge for, *ib.*
 mines, in case of, *ib.*
 under Settled Land Act, 667.
 of slaves, 109.
 of villeins, 217.
 England,
 laws of, 1.
 divisions of, 117.
 ecclesiastical, 118.
 civil, 125.
 countries subject to, 82.
 English constitution, 30, 146.
 English laws,
 when in force in a colony, 101, 102.
 Enjoyment, time of, 305.
 Enlargement of term,
 into fee simple, 288.
 Enlarger l'estate,
 release by way of, 485.
 Enlarging statutes, 69.
 Enrolment,
 of bargain and sale, 500.
 of disentailing deed, 534.
 of deed dedicating land for gar-
 dens, &c., 664, 669.
 Entails,
 origin of, 230.
 varieties of, 239, 538.
 equitable, 538.
 bar of, by recovery, 242, 526.
 by fine, 244, 520.
 by disentailing deed, 533.
 no merger of, 310.
 effect of judgments on, 246.
 not within 3 & 4 Will. IV. c. 104,
 ib.
 in copyholds, 575.
 in incorporeal hereditaments, 626.
 in money to be turned into land, 539.
 quasi, 421.
 where reversion in crown, 531.
 devise of, when no lapse, 559.
 Entireties,
 tenants by, 330.
 husband and wife no longer,
 inter se, 331.
 Entirety of interest, 329, 336.
 Entry,
 of heir, 374, 402, 564.
 of devisee, 564.
 of lessee, 279.
 of lord, 407.
 on breach of condition, 293.
 or of covenant, 293, 461, 481,
 492.
 right of, 437.
 Entry and demise, 622.
 Entry and feoffment,
 release by way of, 487.
 Entry on court rolls, 589.
 En ventre, 141, 320, n.
 Equality of exchange, 666.
 of partition, *ib.*
 Equitable,
 dower, 362.
 estates, 225, 344.
 mortgage, 297.
 waste, 252.
 Equity,
 of a statute, 71.
 of redemption, 299, 344.
 various meanings of, 79.
 origin of, *ib.*
 business of, 79—81.

- Escheat,**
 nature of, 162, 177, 191, 208, 407
 et seq.
 none of the old use, 351.
 propter defectum sanguinis, 408.
 propter delictum tenentis, 413.
 title by, 407.
 under Intestates' Estates Act
 (1884), 363, 418.
 not now valued in, upon enfran-
 chisements, 580.
- Escrow,** 465.
- Escuage,** 200.
- Estate,**
 definition of, 225.
 distinguished from a possibility,
 ib.
 from a power, *ib.*
 at sufferance, 284.
 at will, 283.
 conventional, 249.
 by elegit, 302.
 by statute merchant, 301.
 by statute staple, *ib.*
 by the curtesy, 257.
 for life, 249, 256.
 for years, 273.
 from year to year, 280.
 in antient demesne, 220.
 in common, 339.
 in coparcenary, 335.
 in dower, 260.
 in expectancy, 305.
 in fee simple, 229.
 in fee tail, 236.
 in gage, 296.
 in joint tenancy, 328.
 in lands, 225, 272.
 in mortgage, 296.
 in pledge, *ib.*
 in possession, 305.
 in remainder, 311.
 in reversion, 306.
 in severalty, 327.
 in trust, 344.
 in vadio, 296.
 merely legal, 256.
 not of inheritance, 249.
 of inheritance, 227.
 on condition expressed, 291.
 on condition implied, 290.
 particular, 307.
 privity of, 486.
 pur autre vie, 249.
 real and personal, 272.
 tail ex provisione viri, 531.
 upon condition, 290.
- Estate by itself,** 705.
- Estate duty,** 700 *et seq.*
 settlement, 705.
 temporary, 699.
- Estate clause,** 640.
- Estates settled,** 248, 658.
- Estoppel,** 453.
- Estovers,**
 rights of particular tenants to,
 251, 279.
 common of, 601.
- Eviction,** 483.
 apportionment of rent on, 625.
- Evidence dehors,** 469.
 of recovery, 530.
- Ex assensu patris,** dower, 264.
- Ex provisione viri,**
 estate tail, 531.
- Excessive bail,** 148.
- Exchange of lands,** 482.
 under Inclosure Acts, 483.
 under Settled Land Acts, 666.
 by parsons, 483.
- Excommunication,** 48, 49.
- Execute the use,** 353.
- Execution of deed,** 465.
- Execution, writ of,**
 against freeholds, 303.
 against copyholds, 579.
- Executory,**
 devises, 563.
 remainders, 316, 510.
 trusts, 358.
 uses, 509, 510.
- Exile,** 150.
- Expectancy,**
 estates in, 305.
- Expenses,**
 of enfranchisements, 594.
 of sales, 646.
- Extinguishment,**
 of common, 604.
 of copyhold, 587.
 of incorporeal hereditaments, 604,
 637.
 of long term, 287.
 release by way of, 487.
- Extraordinary conveyances,** 565.

Extra-parochial places, 120, 121.

Extra territorial waters, 117, n.

Extravagantes,
communes, 41.
Johannis, *ib.*

Eyots, 424.

F.

Factum or deed, 453.

Failure,
of heirs of purchaser, 398.
of issue of purchaser, 385.
of issue generally, 561, 564.

Fairs and markets, 609.

Falkland Islands,
Acts relating to, 105, n.

Farm (or feorme), 481.

Fealty, 176.

Fear, 142, 150.

Fee, 227, 228.
base, 238, 525.

Fee farm rent,
meaning of word, 621.
mode of creating, *ib.*

Fee simple,
what it is, 229.
how created, 229, 233, 639.
how held, 229, 230.
incidents of, 230, 231.
abeyance of, 231.
varieties of, 233.
absolute, *ib.*
qualified, 234.
conditional, *ib.*

Fee tail,
what it is, 236.
origin of, 237.
varieties of, 239.
special, *ib.*
general, *ib.*
male, *ib.*
female, *ib.*
how created, 239, 639.
how held, 241.
evil effects of, 242.
decline of, 243.
barring of, 245, 533.
leases derived out of, 247.

Felony,
of trustee, 361.
of cestui que trust, 362, 363.
new, 416.
of tenant in fee simple, 413 *et seq.*

Felony Act (1870), 59, 360, 417.

Female wards,
marriage of, 192.

Feme covert,
conveyances by or to, 448, 539.
will by, 548, 549.

Feodum,
militare, 188.
talliatum, 237, n.

Feoffee, 227.

Feoffee to uses, 348.

Feoffment, 227, 473.
by a lunatic, 446, 447.
forfeiture by, 437, 478.
in gavelkind, 65, 211.
must be by deed, 227.
operation of, by wrong, 308, 315.
to uses, 347, 498.
writing required for, 227.
tortious, 308, 315, 438, 478.

Feoffor, 227.

Feorme, 481.

Feræ naturæ, 161, 611.

Ferries, 609.

Feuda, 173, n.

Feudal system,
origin of, 172.
introduction of, into England, 180.
hardships of, 183.

Feuds,
origin of, 172.
nature of, 173.
utility of, 174.
grant of, 175.
incidents of, 176.
varieties of, 179.
introduction of, into England, 180.

Feudum,
antiquum, 373.
apertum, 408.
improprium, 180.
individuum, 381.
maternum, 386.
militare, 179.

Feudum—*continued*.

- novum, 373.
- novum ut antiquum, 373, 374.
- paternum, 396.
- proprium, 180.

Fidei commissum, 344.

Fief—see FEUDS.

Fief d'haubert, 187.

Fine,

- to bar dower, 268.
- nature of, 519, 520.
- varieties of, 520, 522.
- effect of, 523.
- with proclamations, 524.
- discontinuance by, 526.
- forfeiture by, *ib.*
- non-claim on, 525.
- by married women, 524.
- by tenant in tail, 244, 520.
- on alienation, 177, 198, 207.
- in copyholds, 219, 576.
- abolition of, 245, 519, 533.

Fines and Recoveries Act, 519.

Fire-bote, 251.

First fruits, 198.

Fish,

- property in, 155, 615.

Fisheries, 615, 616.

Fitzherbert's Abridgment,
references to, 56.

Fixed fines, 219.

Fleta,

- references to, 55.

Flogging, 146.

Folkland, 213.

Foot of a fine, 522.

Foreclosure, 300.

Foreign dominions, 116.

Foreign ecclesiastics, 347.

Foreign Jurisdiction Acts, 103.

Forensic medicine, 7.

Foreshore, 117.

Forest,

- franchise of, 614.
- laws of, 612.

Forfeiture,

- incident to feuds, 177, 198, 208.
- nature of, 178, 425.
- none of the old use, 351.
- in copyholds, 198, 576.
- of estates tail in possession, 244.
- in mortgages, 297, 298.
- to Crown, 414, 415, 425.
- to lord, 425.
- by misuser, 637.
- by non-user, *ib.*
- relief from, 417, 651.
- in case of leases, 651, 652.
- remission of, 417, 430.
- on attainder, 425 *et seq.*
- title by, 425.

Formam doni, secundum, 237, 256.

Formedon, 526.

Former estate, 378, 507.

Fortescue,

- references to, 13, 43, 56.

Fowls of warren, 615.

Fraction of time, 275.

Franchises, 608.

Frank tenement, 226.

Frankalmoign, 222.

Frankmarriage, 239, *n.*, 336.

Frankpledge, 125.

Frater fratri uterino, &c., 396.

Frauds,

- statute of, 227, 278, 362, 421, 465,
476, 480, 489, 492, 502, 549.

Fraudulent attornment, 442.

Fraudulent devises,
statute of, 404.

Free fishery, 615.

Free pledges, 125.

Free services, 186.

Free socage, 204.
character of, 186, 204, 205.
incidents of, 205.

Free warren, 615.

Freebench, 575.

Freehold,
 generally, 226.
 by wrong, 477.
 customary, 222.
 in abeyance, 232.
 in futuro, 312, 351.
 in remainder, 316.

Freehold estate,
 of inheritance, 227.
 not of inheritance, 249.

Freehold tenure, 208.

Frontagers, 633.

Fruit trees, 253.

Futuro, estates in, 312, 351.

G.

Gage, estates in, 296.

Game, 611—615.

Gavelkind, 59, 65, 210.

General Inclosure Act (41 Geo. III. c. 109), 602—see INCLOSURE ACTS.

General Vestry Act, 122.

General words, 640.

Gift of lands, 477.

Gilbert, Chief Baron,
 references to, 56.

Glanville,
 references to, 55, 85, n.

Glebæ ascriptitii, 187.

Good consideration, 468.

Goods and chattels, 272.

Government,
 forms of, 28.
 origin of, 27.

Governor,
 of colony, 102.

Governor-General,
 of India, 112.

Grand coustumier,
 of Normandy, 47, n., 100.

Grand serjeanty, 199.

Grant,
 at common law, 478, 628.
 to uses, 503.
 now conveyance, 479, 504.
 of incorporeal hereditaments, 628.

Grant, Royal, 567.

Grantee of reversion, 295, 296, 481.

Grantee to uses, 348, 640.

Grass, 253.

Gratian's decree, 40.

Great Britain,
 defined by Act of Union, 86.

Great charter, 146, 147, 151, 165, 184, 193, 195, 200.

Great seal, 569.

Great session,
 courts of, 84.

Gregorius, 40.

Gregory's decretals, 40.

Gross,
 common in, 599.
 villein in, 213.

Ground game, 611—615.

Guardian,
 in chivalry, 189.
 in copyhold, 218.
 in socage, 205.

Guernsey, 100.

H.

Habeas corpus, 147.
 ad subjiciendum, 100, n.

Habeas Corpus Act,
 provisions of, 147, 148.
 suspension of, 149.

Habendum, 457.

Habitations,
 property in, 157, 158.

Hæreditas jacens, 420.

Hæreditas nunquam ascendit, 385.

Hale, Sir Matthew, 53.

Half-blood, 391.
 former exclusion of, 392.
 new rule as to, 397.

Hamlet, 127.

Hares,
 beasts of warren, 615.

- Hawkins,
 Pleas of the Crown, 56.
 Hay-bote, 251.
 Headborough, 125.
 Health,
 injuries affecting, 146.
 Hedge-bote, 251.
 Heir,
 general, 228, 368.
 apparent, 368.
 presumptive, *ib.*
 capacity to be, 409.
 is a word of limitation, 232, 639.
 when he takes by purchase, 397.
 is liable to ancestor's debts, 403,
 404.
 cannot disclaim, 451.
 Heir, entry of, 374, 402, 564.
 Heir of the body—see ENTAILS.
 Heirlooms, 678.
 Heligoland,
 Acts relating to, 105, n.
 Hereditament,
 meaning of, 170.
 corporeal, *ib.*
 incorporeal, *ib.*
 Heriot, 218, 577.
 Heriot custom, 578.
 Heriot service, 578.
 Heritable jurisdictions, 202.
 Hermogenes, 39.
 High bailiff, 128.
 High constable, 128.
 High seas, 115.
 High-water mark, 117.
 Highways, 604.
 Hinde Palmer's Act (1870), 405.
 Hobart's Reports, 55.
 Hobhouse's Act (1827), 123.
 Holden,
 lands are, 184.
 Holding over,
 by tenant, 285.
 Homage,
 in freeholds, 176.
 in copyholds, 218.
 Homicide, 141.
 Hong Kong,
 Acts relating to, 105, n.
 Honor, 212.
 Honorary feuds, 179.
 Hotchpot, 337.
 House-bote, 251.
 Human laws, obligation of, 35.
 Hundred,
 compensation by the, 125, 128, n.
 division of counties into, 125, 128.
 Husband and wife, 330.

I.

 Id certum est,
 quod certum reddi potest, 277.
 Idiots,
 bar of tail of, 537.
 conveyances by, 446.
 devise by, 548.
 Illegal alienation, 437.
 Illegal condition, 294.
 Illegal consideration, 468.
 Immediate descent, 392, 412.
 Immemorial usage, 47, 62, 630.
 Imparl, 527.
 Impartible, 338.
 Impeachment of waste, 252.
 Imperfect and perfect,
 tenures are, 242, 251, 285.
 Imperial constitutions, 38, 49.
 Imperial Titles Act (1876), 115.
 Implication of estate, 554, 555.
 Implied condition, 290.
 Implied covenant, 461, 641.
 Implied cross remainders, 555.
 Implied estate, 554.
 Implied powers,
 in mortgages, 643.

- Implied trust, 358.
- Implied use, 505.
- Implied warranty, 459, 460.
- Impossible condition, 294.
- Imprisonment,
 - illegal, 149.
 - legal, 150.
- Improper feuds, 180.
- Improvement of Lands Act (1864), 659.
- Improvements, Settled Land Acts, 658, 672.
- In alieno solo, 614.
- Incerti temporis,
 - statutes, 66, n.
- Incidents to reversions, 307.
- Inclosure Acts, 602.
- Inclosure commissioners, 603.
- Inclosure of common, 602.
- Inconsistent,
 - customs must not be, 65.
- Incorporeal hereditaments,
 - nature of, 595.
 - are tenements, *ib.*
 - extinction of, 637.
 - how conveyed, 628.
- Indenting, 454, n.
- Indenture, 432, n., 454.
- Indentures of a fine, 522.
- India,
 - acquisition of, 111.
 - Acts relating to, 108, n., 114, n.
 - imperial assumption of, 115.
 - Governor-General of, 112.
 - council of, 114.
 - bishops of, 112.
 - mutiny in, 113.
 - presidencies of, 112.
 - secretary for, 114.
- Induction,
 - to a benefice, 475.
- Infants,
 - conveyances by and to, 447, 450.
 - devise by, 548.
 - feoffment of, 65.
 - provisions of Conveyancing Act (1881) regarding, 653, 654.
 - provisions of Settled Land Act (1882) regarding, 657.
- Ingress, egress, and regress, 283.
- Inheritable blood, 408.
- Inheritance,
 - canons of, 370.
 - collateral, 385 *et seq.*
 - copyhold of, 218, 574, 588.
 - estates of, 227.
 - origin of, 161.
 - words of, 232, 554, 556, 639.
- Inheritance Act, 369.
- Initiate,
 - tenant by curtesy, 259.
- Injury,
 - civil, 140.
- In mortuâ manu, 345.
- Innocent conveyances, 514.
- Innocent the Fourth, 12.
- Inns,
 - of Chancery, 16, n.
 - of Court, 14, n.
- Inops consilii, 554.
- In pais, matter, 472.
- In pari materiâ,
 - statutes, 74.
- In proprio solo, 614.
- Inquisitio post mortem, 191.
- Inrolment,
 - of bargain and sale, 500.
 - of disentailing deed, 534.
 - of deeds dedicating gardens, &c., 664, 669.
- Insane persons,
 - conveyance by and to, 446, 450.
 - devise by, 548.
- Instalment,
 - in dignities, 475.
- Instalments, payment by,
 - of succession duty, 696.
 - of estate duty, 703.
- Institutes,
 - of Gaius, 39, n.
 - of Justinian, 39.
 - of Coke, 57.
- Instructions,
 - to colonial governors, 106.
- Insure, 673.
- Intercommoning, 599.

Interesse termini, 279, 485.
 Interest,
 on duty, 703.
 on duty in arrears, *ib.*
 Interest of witnesses to will, 550, 552.
 Interests, reversionary, 326.
 Interlineation,
 of a deed, 467.
 of a will, 553, 554.
 Interpretation Act (1889), 67, n., 68,
 78, 274, 567.
 Interpretation of statutes, 68.
 Interruption,
 of right, 63, 630, 635.
 Intruder, 285.
 Investiture, antient, of land, 176, 188.
 Investments, 675.
 variation of, 676.
 Ireland,
 acquisition of, 91, 92.
 laws applicable to, 92.
 Act of Union, 96.
 suspension of Habeas Corpus Act
 in, 149.
 Irish Church,
 disestablishment of, 96, n.
 Islands,
 adjacent to Great Britain, 98.
 Channel, 100.
 rising of, in the sea, 423.
 in a river, *ib.*
 Isle of Man, 98.
 Isle of Wight, 98.
 Issue,
 born, 235.
 equivalent to heirs, 240, 241.
 dying without, words of, in a de-
 vise, 561.
 of the purchaser, 392.
 failure of, 385.

J.

Jamaica,
 Acts relating to, 106, n.—see WEST
 INDIES.
 James I.,
 his canons, 42.

Jersey, island of, 100.
 John, king, 184.
 Joint tenancy,
 nature of, 328.
 how dissolved, 332.
 Jointure, 265, 328.
 Judges,
 the depositaries of the law, 51.
 Judgment,
 elegit upon, 303, 579.
 Judicature Acts (1873, 1875, &c.), 81,
 133, 252, 301, 309.
 Judicial declaration,
 of title, 692.
 Judicial notice, 567.
 Judicial separation,
 effect of, on dower, 262.
 Jura regalia, 131, 132, 135.
 Jurats, 100.
 Juris præcepta, 20, n.
 Juris, scintilla, 354, n.
 Jus accrescendi, 332.
 prefertur oneribus, *ib.*
 prefertur ultimæ voluntati, 334.
 Jus ad rem, 474.
 Jus fiduciarium, 345.
 Jus gentium, 23.
 Jus in re, 475.
 Jus precarium, 345.
 Justinian, laws of, 39.

K.

Kent,
 gavelkind in, 210.
 Keys, House of, 98.
 King, grant by, 567.
 King's Bench,
 Ireland, 95.
 England, *ib.*
 King's silver, 521.
 Knight of the shire, 130.

Knight service tenure,
character of, 186.
incidents of, *ib.*
oppressions of, 201.
abolition of, 202.

Knight's fees, 188.

Knighthood, 191.

L.

Labour,
property founded upon, 159.

Lancaster,
county palatine of, 131.
Court of Common Pleas of, 133.

Land,
meaning of the term, 168.
origin of property in, 155 *et seq.*
holden of crown, 228.

Land charges,
definition of, in Act (1888), 689, n.
registration of, 689.

Land Charges, Registration and
Searches, Act (1888), 688, 689.

Land registry, 680—see REGISTRATION.

Land tax,
origin of, 200.

Land Transfer Act (1875), 683 *et seq.*

Lands Clauses Consolidation Act
(1845), 165, n.

Lapsed devise, 558.

Last entitled, 371, 398.

Latent ambiguity, 470.

Lateran, council of, 119.

Lathes in Kent, 129.

Law,
definition of, 23.
varieties of,—
 canon, 7, 10, 40.
 civil, 7, 10, 38.
 common, 8.
 divine, 21.
 feudal, 172 *et seq.*
 maritime, 48.
 merchant, 60.
 municipal, 23.
 of nations, 22.
 of nature, 20.
 of revelation, 21.

Law—*continued.*
 varieties of—*continued.*
 Roman, 38.
 statute, 66.
 unwritten, 43.
 written, 66 *et seq.*

Law and equity,
 fusion of, 80, 81.

Lawful conveyances, 514.

Laws in general,
 law of nature, 20.
 law of revelation, 21.
 law of nations, 22.
 municipal law, 23.

Laws of England,
 importance of the knowledge of,
 1—9.
 antient neglect of, in universities,
 9—11.
 rivalry between, and civil and
 canon laws, 11—14.
 study of, in London inns, 14.
 countries subject to, 82.
 Wales, *ib.*
 Scotland, 85.
 Berwick, 90.
 Ireland, 91.
 Isle of Man, 98.
 Channel Islands, 100.
 Colonies, 101.
 India, 110.

Le grand coutumier, 47, n., 100.

Leading the uses,
 of fine or recovery, 522.

Leap year, 274.

Lease and entry, 502.

Lease and release, 494, 502.

Leaseholds, 559.

Leases, 479.
 in writing, 480.
 by deed, *ib.*
 operative words in, 481.
 covenants in, *ib.*
 practice as to preparing, 456, n.
 by tenant for life, 248, 252.
 by tenant in dower, 271.
 by tenant by the curtesy, 260.
 by husband of wife's lands, 280, n.
 by tenant in tail, 244, 247.
 by cities and boroughs, 444, 445.
 in futuro, 480.
 long, 286.
 forfeiture of, 461, 651, 652.

- Leasing powers, 248, 511.
under Settled Land Act, 658 *et seq.*
- Lectures,
at Inns of Court, 18, 18, n.
- Leeward Islands,
Acts relating to, 105, n.
- Legacy duty, 694.
- Legal education, 17, 18.
- Legal estate, 226.
outstanding, 648.
- Legal memory, 47, 62, 630.
- Legal personal representative, 299,
303, 648.
- Legatine constitutions, 41.
- Leges posteriores,
prioris abrogant, 77.
- Leges scriptæ, 43, 66.
- Legislative powers,
distinguished from executive, 30.
- Legislature,
colonial, 102.
- Less than freehold, 226.
- Lessee—see LEASES.
- Letter of statute, 71.
- Letters close, 568.
- Letters patent, *ib.*
- Levant and couchant, 600.
- Levinz's Reports, 55.
- Levying money,
without consent of parliament, 166.
- Lex mercatoria, 60.
- Lex non scripta, 43.
- Lex scripta, 43, 66.
- Liber judicialis,
of Alfred, 44.
- Liberi socmanni, 203, 204.
- Liberties,
merger of, in counties, 129, n.
- Liberties and franchises, 608.
- Liberty, personal, 147.
- Liberum,
maritagium, 239, n.
tenementum, 225, 303.
- Licence,
to alienate, 198.
in case of copyholds, 593.
to assign, 653.
to demise copyhold, 581.
to hold in mortmain, 426, 428.
is usually revocable, 226.
- Licentia concordandi, 520.
- Life,
right to, 141.
forfeiture of, for crime, 145.
- Life, estate for,
conventional, 249.
legal, 256.
under Settled Land Act (1882),
658.
- Light, 161, 607, 636.
- Limbs,
defence of, 142.
- Limitation, and not purchase, 323.
- Limitation, conditional, 292.
- Limitation, Statutes of, 298, 477, 478.
- Limitation to uses, 355, 504.
- Limited Owners,
Residences Act (1870), 247, n.
Reservoirs &c. Act (1877), *ib.*
Settled Land Act (1882), 683
et seq.
- Lineal ancestors,
admitted to descent, 385.
- Lineal warranty, 460—see WARRANTY.
- Littleton's tenures, 57.
- Livery,
in deed, 476.
in law, 477.
lying in, 479.
of seisin, 227, 474.
or ousterlemain, 190.
- Local and personal Acts, 68.
- Local authorities, 435.
- Local courts, 129.
- Local customs, 59.
- Local Government Board,
consent of, 446.
- Local Inclosure Acts, 602.
- Local taxes, 121.
- Local venue, 130, n.

Locke King's Acts, 299.

London,
 customs of, 59, 61.
 proof of, 62.

Long terms,
 cesser of, 286.
 extinguishment of, 287.
 enlargement of, 288.

Lord and vassal, 174.

Lord Brougham's Act,
 provisions of, 68.
 repeal of, *ib.*

Lordships, 211.

Lot meads, 599.

Low water mark, 117.

Lunar month, 274.

Lunatics,
 under Settled Land Acts, 657.
 sales by and to, 446 *et seq.*, 450.
 bar of estate tail of, 537.
 copyholds of, 586.

Lying in grant,
 or in livery, 479, 628.

Lying in prendre,
 or in render, 617.

Lyndewood's Provinciale, 41, n.

M.

Madmen—see LUNATICS.

Madras,
 bishop of, 112.

Magna Charta, 66, 146, 147, 151, 165,
 184, 191, 200.

Maiming, 146.

Main sea, 117.

Mala,
 in se, 33.
 prohibita, 34.

Mala grammatica, 469.

Malacca,
 Acts relating to, 106, n.—see
 STRAITS SETTLEMENTS.

Males,
 preference of, in descent, 378.

Man, island of, 98.

Manors, 211.
 conterminous with parishes, 120.

Manumission,
 of villeins, 215.

Manx children, 98, n.

Marcheta, 209.

Marginal notes,
 to statutes, 75.

Maritagium, 192.

Maritime law, 48.

Mark,
 signing deed by a, 463, 464.

Market, fair, and ferry, 609.

Market towns, 126.

Marriage,
 in chivalry, 192.
 in socage, 206.
 revokes will, 550, 553.

Married woman,
 as bare trustee, 363, 648.
 as ordinary trustee, 364, 648.
 will of, 548, 549.
 as tenant for life under Settled
 Land Acts, 657.
 See FEME COVERT.

Married Women's Property Acts
 (1882, 1893), 331, 364, 648.

Master of the Rolls,
 custody of records, 51, n.

Maternal line of descent, 389.

Mauritius,
 Acts relating to, 105, n.

Maxims, 51—see CUSTOMS.

Mayhem, 142.

Medical jurisprudence, 7.

Members of Parliament,
 for Wales, 84.
 for Scotland, 87.

Memory,
 time of legal, 63, 630.

Menaces, 142.

Mercen-lage, 45.

Merchant laws, 60.

Merchant, statute, 301—see STATUTE
 MERCHANT.

Merchants, custom of, 60.

- Mercheta**, 209.
Mere power, 225.
Merger,
 of term in freehold, 309.
 in term, 310.
 of freehold in freehold, 309, 310.
 of fee simple conditional, 310.
 none of estate tail, *ib.*
Merton,
 statute of, 11, 67, n., 194, 601.
Mesne lords, 185.
Middlesex,
 registration in, 680.
Midnight,
 payment before, 623.
Military,
 feuds, 179.
 tenures, 187.
Militia, 153, n.
Minas,
 duress per, 142.
Mines,
 in copyholds, 576, 594.
Mining leases, 668.
Mining rent,
 apportionment of, 671.
Mirroure, The, 55.
Miscarriage,
 procuring, 141.
Misuser,
 forfeiture for, 637.
Mitter le droit, 487.
Mitter l'estate, 486.
Mixed government, 28.
Modern statutes, 72.
Modus legem dat donationi, 473.
Modus levandi fines (18 Edw. I.), 520.
Monarchy, 28.
Monk, 144.
Monmouth,
 county of, 84.
Monster,
 cannot be heir, 409.
Month,
 calendar, 274.
 lunar, *ib.*
Mortgage,
 legal, 297.
 equitable, *ib.*
 provision in Judicature Act as to,
 301.
 statutory, 642.
Mortgagee,
 his estate, 297.
 his powers, 643.
Mortgagor,
 his equity of redemption, 299.
 his powers of leasing, 643.
Mortmain, 345, 425 *et seq.*—see **MORT-
MAIN ACTS.**
Mortmain Acts,
 history of, 346, 425 *et seq.*
 provisions of, 432.
 relaxations of, 432 *et seq.*
 alienation under, 425 *et seq.*
Mortuo vadio,
 estate in, 296.
Mother churches, 119.
Moveables,
 property in, 160.
 right of disposing of, by will, 163.
Mulier puisné, 410.
Multiplication of charges, 677.
Multiplication of heriots, 579.
Munera, 173, n.
Municipal corporations, 125, 445.
Municipal law,
 is a rule, 23.
 of civil conduct, 24.
 prescribed by sovereign, 25.
 is either (1) declaratory, 33.
 or (2) directory, 34.
 or (3) remedial, *ib.*
Mutual conveyances, 483.

N.

Nations,
 law of, 22.
Nativi, 214.
Natural affection, 499.
Natural death, 143.

- Natural liberty, 146.
 Natural life, 141, 250.
 Naturalization, 136, 449.
 Naturalization Act (1870), 412, 449, 450.
 Nature,
 law of, 20.
 Navigable rivers, 616.
 Ne exeat regno,
 writ of, 150.
 Neglect of office, 291.
 Negro slavery, 108.
 Neife, 214.
 Nemo est hæres viventis, 368.
 Nephew,
 in descent, 385, 386.
 New appointment, 511.
 New Brunswick,
 Acts relating to, 105, n.
 New code of Justinian, 39.
 New felonies, 416.
 Newfoundland,
 Acts relating to, 105, n.
 New South Wales,
 Acts relating to, 105, n.
 New Zealand,
 Acts relating to, 105, n.
 No fee on fee, 509.
 unless executory, *ib.*
 or unless alternative, 510.
 Nominal rent, 433.
 Non-claim,
 bar by, 525.
 Non compos—see LUNATICS.
 Non obstante clause, 430.
 Non-user,
 forfeiture for, 637.
 Norfolk Island,
 Acts relating to, 106, n.
 Norman conquest, 180, 366.
 Norman jurisprudence, 47.
 Normandy, 100.
 North sea,
 fisheries, 117, n.
 Note of a fine, 522.
 Notice,
 to pay off mortgage, 298.
 to quit, 281.
 under Agricultural Holdings Act, 282, n.
 under Settled Land Acts, 661.
 Not of inheritance, 227.
 No use upon a use, 355.
 Nova Scotia,
 Acts relating to, 106, n.
 Nova statuta, 66, n.
 Novels of Justinian, 39.
 Nullius filius, 409.
 Nullus clericus,
 nisi causidicus, 8.

O.

 Oath of fealty, 176.
 Obligation of laws, 36.
 Obliterations in wills, 550, 553.
 Occupancy,
 colonies gained by, 101.
 common, 420.
 special, *ib.*
 title by, 159, 419.
 Office, 290.
 Office of Land Registry, 680—see
 REGISTRATION.
 Official certificate, 690.
 Official search, 690.
 Official trustee,
 of charity lands, 435.
 of charitable funds, *ib.*
 Old or former estate, 378, 507.
 Old use, 507.
 Operation of statute, 69.
 Option of purchase,
 in lease, 668.
 Order,
 elegit on, 303, n.
 of chancery division, 649, 650.

Orders and writs,
affecting land, 688.

Origin,
of common law, 43.
of equity, 78.
of property, 155.

Original deed, 455.

Ostium ecclesiæ,
dower ad, 263.

Ouster, 306.

Ousterlemain, 190.

Outstanding terms, 287, 288.
legal estate, 648.

Owens College, 18.

Ownership, potential, 422.

P.

Paid vestry clerk, 124.

Pais,
conveyances in, 472.
matter in, *ib.*

Palatine counties, 131.

Palmer, Sir Geoffrey, 321.

Pandects, 39.

Pannage, 597.

Papirius, 39.

Paramount, lord, 185.

Paravail, tenant, 185.

Parceners, 335.
title of, after partition, 403.

Pares curiæ, 258.

Parish,
meeting, 121, 122.
offices, 121.
definition of, 118.
origin of, 118, 119.
boundaries of, 124, n.
common rights of, compensation
for, 125, n.
council, 124, 687.

Park, 615.

Pars rationabilis, 270, n.

Parson,
emblems of, 254.
exchange by, 483.

Parte paternâ, ex, 371.

Parte maternâ, ex, 371.

Partes finis,
nihil habuerunt, 525.

Particular customs, 58.

Particular estate, 306.

Particular tenants, 436.

Parties,
to a deed, 454.
to a fine, 523, 524.

Partition,
of coparcenary, 338.
of joint tenancy, 332.
of tenancy in common, 343.
suit for, 333.
deed of, 333, 484.
under Settled Land Acts, 666.
writ of, 333.

Partnerships, 80.

Partridge,
a fowl of warren, 615.

Partus sequitur ventrem, 214.

Passing a right, 487.

Passive trusts, 357.

Pasture, common of, 64, 597.

Patent ambiguity, 470.

Patent rolls, 568.

Patents, 568.

Paternal line in descent, 388.

Patron and client, 194.

Peaceable,
enjoyment of custom, 63.

Pecuniary consideration of bargain and
sale, 499.

Peers of Ireland, 97.
of Scotland, 87.

Penal servitude, 151, n.

Penal statutes, 68 — see STATUTES,
VARIETIES OF.

Pensions, 596.
for colonial services, 108, n.

Peppercorn rent, 668.

Per capita, 383.

- Percentage,
 of legacy duty, 694.
 of succession duty, 696.
 of estate duty, 700.
- Perfect and imperfect,
 tenures are, 242, 251.
- Permissive waste, 251, 279, 283.
- Per my et per tout, 330, 330, n.
- Pernancy of profits, 352.
- Perpetual rents,
 redemption of, 622.
- Perpetuity,
 doctrine of, 514, 564.
 leases in, 669.
- Personal,
 Act of Parliament, 68.
 annuity, 595, 620.
 chattels, 167.
 estate, *ib.*
 liberty, 147.
 representative, 299, 303, 648.
 rights, 137.
 security, 141.
 things, 167.
- Personal property, 167—see PERSONAL.
- Personal rights,
 personal security, 141.
 personal liberty, 147.
- Per stirpes, 208.
- Per tout, et non per my, 330.
- Petit serjeanty, 208.
- Petition of right, 147, 166.
- Petition to repeal patent, 571.
- Pheasant,
 a fowl of warren, 615.
- Pickage, 610.
- Piscary, common of, 600.
- Pledge, estates in, 296.
- Pledges en bloc,
 of securities, 61.
- Plenum dominium, 475.
- Plough-bote, 251.
- Ploughland, 188.
- Plowden's Reports, 55.
- Poll, deed, 455.
- Poor,
 rate, 130.
 laws, 143.
- Poor livings,
 augmentation of, 431.
- Portland, isle of, 98.
- Possessed or seised, 273, 278, 354.
- Possessio fratris, &c., 392, 394, 412.
- Possession,
 estates in, 305.
 naked, 306.
 held over, 285.
 right of, 156, 157, 306.
- Possessions, colonial, 101.
- Possibility,
 distinguished from estate, 225.
 common, 318.
 coupled with an interest, 225.
 double, 318.
 of reverter, 238, 307.
 remote, 318.
 upon a possibility, *ib.*
- Possibility of issue extinct,
 tail after, 256.
- Post fine, 521.
- Posthumous child, 320, 515.
 entitled as remainderman, 320, n.
 entitled as heir, *ib.*
- Potentia,
 propinqua, 318.
 remota, *ib.*
- Potential ownership, 422.
- Power,
 distinguished from estate, 225.
 to appoint, executed by devise,
 560, 561.
- Powers,
 of revocation and new appoint-
 ment, 511.
 succession duty on, 697, 698.
 release of, 513.
 disclaimer of, *ib.*
 of mortgagee, 643.
 of tenant for life under Settled
 Land Acts, 657.
 implied in mortgages, 643.
- Poynings' Laws, 93.
- Practice as to preparing deeds, 456, n.

- Præcipe,
 in a fine, 520.
 in a recovery, 527.
 tenant to the, 528.
- Premunire, 151.
- Prætor fideicommissarius, 346.
- Prayer Book Act (1871), 88, n.
- Preamble,
 of statute, 75.
- Precedent, condition, 291, 295.
- Predecessor and successor, 695.
- Preferments,
 exchange of, 483.
- Preliminary bar examination, 17, n.
- Preliminary contracts, 646.
- Premises,
 of a deed, 456.
- Prescription,
 incorporeal rights acquired by,
 597 *et seq.*
 at common law, 62, 629.
 by statute, 62, 634.
 in a man and his ancestor, 631.
 in a que estate, *ib.*
 distinguished from custom, 629.
 liability by, 633.
 commons by, 634.
 easements by, 636.
 rights by, *ib.*
- Presentment,
 by the homage, 592, 593.
- Presidencies, Indian, 113.
- Preston's Act, 588.
- Presumptive heir, 368.
- Primaria ecclesia, 119.
- Primary conveyances,
 distinguished from derivative, 484.
- Primer fine, 520.
- Primer seisin, 197, 207.
- Primitiæ, 198.
- Primogeniture, 380.
- Prince of Wales, 83.
- Prince of Wales' Island,
 Acts relating to, 106, n.—see
 STRAITS SETTLEMENTS.
- Principal mansion house, 664.
- Principal value, 700, 706.
- Private Acts, 67, 565 *et seq.*
- Private bill office, 567, n.
- Private relations,
 rights in, 138 *et seq.*
- Privies to a fine, 524.
- Privileged villenage, 187, 220.
- Privileges without profit, 596.
- Privy of estate, 486.
- Privy purse, 572.
- Privy seal, 568.
- Probate duty, 694.
- Procedure,
 since fusion of law and equity, 81.
- Proceedings,
 in personam, 48.
 in rem, *ib.*
- Proclamations,
 fine with, 522, 524.
- Procreation, words of, 240.
- Production,
 of cestuis que vie, 325.
 of title-deeds, 646, 647.
- Profession, monkish, 144.
- Professorships of law, 17.
- Profits a prendre, 596.
- Profits in alieno solo, 596.
- Prohibition,
 to leave the realm, 150.
- Pro indiviso, 332.
- Promulgation of laws, 25.
- Proper feuds, 180.
- Property,
 origin of, 155.
 abandonment of, 160.
 transfer of, 161.
 personal—see PERSONAL PROPERTY.
 real—see REAL PROPERTY.
 rights of, 154.
- Propositus, 370.
- Protection,
 of purchasers and mortgagees,
 680.
- Protector,
 of the settlement, 246, 534.
 in the case of copyholds, 589.

Prothonotaries, 54.
 Province of an archbishop, 118.
 Provincial constitution, 41.
 Provincial synods, 41.
 Proviso for re-entry, 482.
 Public,
 Act of Parliament, 67.
 rights, 138.
 Public bar examination, 17—see BAR STUDENTS.
 Publication of will, 549, 552.
 Punishment,
 capital, 145.
 for crime, 140.
 Pur autre vie,
 tenant, 249, 254, 419.
 rents, 627.
 Purchase,
 title by, 366.
 Purchase, limitation and not, 323.
 Purchaser,
 blood of the, 372, 374.
 by conveyance to self, 377, 378, 508.
 descent from the, 369.
 meaning of term, 366, 370.
 quasi, 398.
 Pure villenage, 186, 219.
 Purely incorporeal hereditaments, 595 *et seq.*
 Purlieus, 613.

Q.

Qualified fees, 234.
 Quantity,
 of estate, 226.
 Quarantine,
 the widow's, 264.
 Quarter sessions, 130.
 Quasi entail, 421.
 Quasi purchaser, 398
 Que estate,
 prescribing in, 631.

Quebec,
 Acts relating to, 105, n.—see CANADA.
 Queen,
 her claim to India, 113.
 Empress of India, 115.
 Queen Anne's bounty, 431.
 Queensland,
 Acts relating to, 106, n.
 Quia emptores,
 statute of, 67, n., 198, 229, 428, 441, 443, 458.
 Quick with child, 141.
 Quiet enjoyment,
 covenant for, 461—462.
 Qui hæret in literâ, 469.
 Qui prior est tempore,
 potior est jure, 300.
 Quit rents, 620.
 Quod nullius est, 419.
 Quod populus postremum jussit,
 id jus ratum esto, 77.
 Quousque, seizure, 585.

R.

Rack rents, 247, 621.
 Railways,
 of India, 115, n.
 Rapes,
 in Sussex, 129.
 Rasure in a deed, 467.
 Rate,
 county, 130.
 local, *ib.*
 of duty, 694, 696, 700.
 Rateable part,
 of estate, for duty, 704.
 Reading of deed, 462.
 Real action, 437.
 Real chattels—see CHATTELS.
 Real estate—see REAL PROPERTY.
 Real property,
 land, 168.
 water, *ib.*
 mines, 169.

- Real property limitations—see **LIMITATION, STATUTES OF.**
- Real Property Statutes—see **STATUTES.**
- Realm,
prohibition to leave, 150.
- Realty, 167.
- Reasonable custom, 63.
fine, 219.
- Receipt,
for rent, 645.
for purchase-money, 649.
- Receiver,
under mortgage, 301, 643.
- Recitals,
in deed, 457.
in statute, 75.
in abstracted documents, 645.
- Recognizance, 301.
- Recompense in value, 531.
- Record,
nature of, 51.
conveyances by, 565 *et seq.*
estoppel by, 453.
- Record office,
public, 51, n.
- Records and Writs,
transfer of, 51, n.
- Recoveree, 527.
- Recoveror, 527, 530.
- Recovery,
nature of common, 242, 526.
force of, 530.
abolition of, 533.
customary, 589.
- Recovery in value, 530, 531.
- Recreation grounds, 431, n., 434, 435.
- Rectification,
of disentailing deed, 536.
- Reddendum,
of deed, 458.
- Redemption,
equity of, 299.
of rents, 622, 648, 649.
- Reditus,
meaning of the word, 179, 188.
albi, 620.
capitales, 620.
nigri, 621.
quieti, 620.
sicci, *ib.*—see **RENTS.**
- Re-entry,
for breach of covenant, 482, 651.
- Reeve's History of the English Law,
56, n., *et passim.*
- Regardant,
villeins, 213.
- Regiam majestatem, 85, n.
- Register,
of writs and orders, 688.
of deeds of arrangement, *ib.*
of land charges, 689.
- Registered land,
mortgages of, 686.
transfers of, *ib.*
- Registration,
of annuities, 619.
of conveyances, 681.
of English companies in colonies,
108, n.
of title, 692, 693.
of writs and orders, 688.
of deeds of arrangement, *ib.*
of land charges, 689.
- Regno, ne exeat,
writ of, 150.
- Relation back,
of admittance to surrender, 586.
- Release,
deed of, 484.
effectual as a lease and release,
503.
of condition, 294.
of powers, 513.
extinction of incorporeal hereditaments by, 637.
from rent-charge, 619.
- Relief,
feudal, 177.
in copyhold, 218.
in knight service, 196.
in socage, 207.
in case of leases, 651, 652.
poor law, 143.
- Religious houses, 346.

- Remainder,
 definition of, 311.
 varieties of,
 contingent, 316.
 vested, 315.
 cross, 342, 555.
 none after fee simple, 311.
 creation of, rules for, 313.
 displacement of, 315.
- Remedial,
 law, 33.
 statutes, 68.
- Remission,
 of forfeiture, 417, 430.
 of escheat, 417.
- Renewable leases, 489, 490.
- Rent,
 nature of, 617.
 origin of, 179.
 incident to reversion, 307.
 apportionment of, 255, 256, 624.
 varieties of,
 acreage, 668.
 minimum, *ib.*
 charity, 623.
 chief, 620.
 nominal, 433.
 quit, 620.
 fee farm, 621.
 peppercorn, 668.
 perpetual, 622.
 redemption of, 650.
 creation of, 665.
 rent-charge, 619.
 remedies for, 650.
 rent of assize, 620.
 rack rent, 621.
 rent service, 618.
 rent seek, 620.
 receipt for, 645.
 redemption of, 622, 650.
- Repair, 673.
- Repeal,
 of statutes, effect of, 77.
 of obsolete statutes, 66, n.
- Reports, law, 54.
- Representation,
 in descents, 382.
- Representative assembly,
 peers (Scotch), 87.
 peers (Irish), 96.
- Republication,
 of will, 553, 554.
- Repugnant,
 clauses in a deed, 471, 493.
 clauses in a devise, 471, 555.
 conditions, 294, 442.
 enactments, 77.
- Reputation,
 security of, 146.
- Requisitions on title, 646.
- Requisites of a deed, 455 *et seq.*
- Rere-fiefs, 179.
- Re-registration, 687.
- Reservation of rent, 459.
- Residuary devise, 559.
- Responsa prudentum, 38.
- Restraining statutes, 69.
- Restraints on alienation, 439, 659, 660.
- Resulting,
 trust, 358.
 use, 505.
- Retrospective,
 operation of statutes, 70, 71.
- Reunion,
 of undivided shares, 579.
 of franchises in crown, 637.
- Revealed law, 21.
- Reversion,
 definition of, 306.
 distinguished from possibility of
 reverter, 238.
 incidents of, 307.
 varieties of, 307, 308.
 displacement of, 308.
 expectant on lease, 309, n.
 old, 507.
- Reversionary interests,
 sale of, 326.
- Reverter,
 possibility of, 238, 310.
- Revision of statute law—see REPEAL.
- Revival,
 of Act, 77, 78.
 of will, 554.
- Revocable licence, 226.

Revocation,
 of a will, 549, 553.
 of uses, 511.

Ridings, 129.

Right close, writ of, 221.

Right of action, 238, n.

Right of common—see COMMON.

Right of entry, 238, 322, 443.

Right of possession, 156, 306.

Right of re-entry, 482, 651.

Right of way, 604.

Rights—see RIGHTS AND WRONGS.

Rights and wrongs,
 personal, 138.
 private, *ib.*
 public, *ib.*

Rights of property, *ib.*

Rivers, 616.

Rolle's Abridgment, 56.

Roman law, 9, 13, 14.

Root,
 of descent, 375.
 of title, 645.

Royal,
 assent, 70.
 domains, 572.
 forests, 613.
 grants, 567 *et seq.*
 University of Ireland, 17.

Rule in Shelley's case, 323.

Rule of perpetuities, 514.

Rules of Stock Exchange, 61.

Running with land,
 covenants, 461, 481, 492, 642.

Rural deanery, 118.

Rural parishes, 123—125.

S.

Sale of property,
 origin of, 161.
 by mortgagee, 300, 643.
 practice on, 456, n., 644, 648.
 under Settled Land Acts, 661.

Sanctions,
 vindictory, compel and oblige, 35.
 remuneratory, persuade and allure,
 36.

Sanctuary, 143.

St. German's "Doctor and Student,"
 56.

St. Helena, 112.

St. Vincent, constitutions of, 106, n.

Sans nombre,
 common, 600.

Sark, island of, 100.

Sarum, Council of, 182.

Satisfied terms, 286, 287.

Saunders' Reports, 55.

Savouring of the realty, 272, 273.

Saxon laws, 45.

Scævola,
 reference to, 5, 6.

Scintilla juris, 354, n.

Scire facias, 571.

Scotland,
 Act of union, 86.
 church of, 88.
 law of, 89, 89, n.
 secretary for, 89.
 universities of, 18.

Scutage, 200.

Sea-bed, 616—see SEA SHORE.

Sea-frontagers, 633.

Sea, high—see HIGH SEAS.

Sea-shore,
 portion of realm, 117.
 alteration of, 423.
 is extra-parochial, 121.

Sea-wall, 633.

Seal,
 antiquity of, 463.
 on deed, *ib.*
 great, 569.
 privy, 568.

Searches, 646, 690.

Seck, rent—see RENT.

Secondary use, 510.

- Secretary of State,
 colonial, 103.
 for India, 114.
 for Scotland, 89.
- Secundum formam doni, 237.
- Se defendendo, 142.
- See, Bishop's, 126.
- Seed,
 in deeds, 240.
 in wills, 241.
- Seignior, 229, 231.
- Seised or possessed, 273, 278, 354.
- Seisin,
 in deed, 259, 402.
 in law, *ib.*
 livery of, 227, 474.
 primer, 197.
 to a use, 496.
 of rent, 627.
- Seisina facit stipitem, 377, 627.
- Seizure quousque, 585.
- Select vestry, 124, n.
- Self-defence, 142.
- Senatûs,
 consulta, 67, n.
 decreta, *ib.*
- Sepoy revolt, 113.
- Serjeant-at-law, 15.
- Serjeanty,
 grand, 199.
 petit, 208.
- Service de chivaler, 187.
- Service, heriot—see HERIOT SERVICE.
- Services,
 free or base, 186.
 certain or uncertain, *ib.*
 in knight's tenure, 189.
 in socage tenure, 205.
 in villein socage, 212.
 in antient demesne, 220.
- Serving the use, 504.
- Servitium militare, 187.
- Session, great,
 courts of, in Wales, 84.
- Settled Estates Act (1877), 247, 260, 450.
- Settled land, 656.
- Settled Land Act (1882), 247, 260, 271, 451, 656 *et seq.*
- Settled Land Act (1884), 679.
- Settled Land Act (1890), 655, 666.
- Settlement,
 family, 321.
 protector of the, 246, 534.
 strict, 321, 678.
 under Settled Land Acts, 656.
 trader's, 678.
- Settlor, 642.
- Several fishery, 616.
- Severalty, estates in, 327.
- Severance,
 of jointure, 332, 333.
 of reversion, 651.
- Sexta Decretalium, 40.
- Shack, common of, 599.
- Shelley's case, rule in, 323.
- Sheppard's Touchstone, 56.
- Sheriff,
 nature of office, 128.
 in Wales, 84, n.
- Shifting use, 510.
- Shire, 128.
- Shore of the sea—see FORESHORE ; SEA SHORE.
- Short workings, 669.
- Sierra Leone,
 Acts relating to—see AFRICA.
- Sign manual, 568.
- Signet, privy, 568.
- Signing,
 deeds, 464.
 wills, 551.
- Simple contract debts,
 of deceased, 404.

- Singapore,
 Acts relating to—see STRAITS SETTLEMENTS.
- "Six months," 274, 275.
- Slavery, 109.
 abolition of, 109.
- Slave trade,
 history of, 109.
 repression of, 109, n.
- Small estates, 705.
- Small holdings, 687.
- Soc, 204, n.
- Socage, 203.
 meaning of the term, 204, n.
 free, 204.
 villein, *ib.*
- Social contract, 27.
- Society,
 origin of civil, 26.
- Socrates, 36.
- Sokemans, 221.
- Sole corporations, 345.
- Sovereign,
 grant by, 567 *et seq.*
- Sovereign power, 28.
- Special customs, 58.
 occupant, 420, 627.
- Special tail—see ENTAILS.
- Specialty debts,
 nature of, 403, 404.
 no priority in administration of
 assets, 405.
- Specific performance, 80.
- Spelman,
 references to, 14.
- Spiritual tenure, 222.
- Springing use, 509.
- Stallage, 610.
- Stamp Acts, 455, n.
- Stamps on deeds, 455.
 on copyhold assurances, 582.
- Staple commodities, 301.
- Staple, mayor of the, *ib.*
- Staple, statute, 301—see STATUTE
 STAPLE.
- Status, 225.
- Statuta,
 incerti temporis, 66 n.
 nova, *ib.*
 vetera, *ib.*
- Statute of Uses—see USES, STATUTE OF.
- Statute, interpretation of,
 general rules for, 69.
 particular rules for, 69, 79.
- Statute law,
 revision of, 66, n.
 repeal of, 77.
- Statute merchant, 301.
- Statute staple, *ib.*
- Statute, varieties of,
 public and private, 67.
 declaratory, 68.
 penal, *ib.*
 remedial, *ib.*
 disabling and enabling, 69.
- Statutes,
 judicially noticed, 68.
 mode of citing, 67, n.
 relating to India, 114, n.
 repeal of, 77.
 revision of, 66, n.
- Statutes,
 Abjuration, 145.
 Accumulations, 516, 517.
 Assets, 246.
 Agricultural Holdings Act (1883),
 282, 482.
 Agriculture (Board of) Act (1889),
 591, 656, 672.
 Appellate Jurisdiction Act (1876),
 87, 97.
 Apportionment Act (1870), 256,
 624.
 Canon Law (25 Hen. VIII. c. 19),
 41.
 Charitable Uses (1888, 1891), 435.
 Charta de Forestâ, 613.

Statutes—*continued*.

- Common Law Procedure (1854), 81.
 Commons Preservation Act (1876), 604.
 Confirmatio chartarum, 165, n., 195
 Contingent Remainders, Act as to (1877), 323, 506, 510.
 Conveyancing Acts (1881), 232, 241, 288, 294, 364, 462, 482, 488, 497, 508, 513, 622, 628, 639, *et seq.*
 (1882), 288, 513, 516, 655, n.
 (1892), 296, 651, 652, 653.
 Copyhold Acts, 590, 648.
 County Councils, 131, 135, 431.
 Crown Lands, 572, n.
 Customs and Inland Revenue Act (1889), 455.
 Debts (1833), 405.
 Declaration of Title Act (1862), 692.
 De donis conditionalibus, 235, 237, 518.
 De mercatoribus, 301.
 De religiosis, 426.
 De Tallagio, 165, n.
 Dower Act (1834), 69, 263, 264, 267, 268, 362, 369, 370, 387.
 Ecclesiastical Leases, 73.
 Felony Act (1870), 59, 360, 417.
 Fines and Recoveries Act, 245, 437, 448, 519, 526.
 Frauds, Statute of, 227, 278, 362, 421, 465, 476, 480, 481, 483, 484, 489, 492, 502, 549.
 Fraudulent Devises, Statute of, 404.
 General Inclosure Act, 602.
 Great Charter — see MAGNA CHARTA.
 Habeas Corpus Act, 152.
 Hinde Palmer's Act (1870), 405.
 Hobhouse's Act (1827), 123.
 Imperial Titles Act (1876), 115.
 Improvement of Lands Act (1864), 247, n., 659.
 Inclosure Acts, 602.
 Infants' Relief (1874), 448.
 Inheritance Act, 369, 417, 508.
 Inrolments, 500.
 Interpretation Act (1889), 67, n., 68, 78, 98, 101, 274, 567.
 Intestates' Estates Act (1884), 363, 418.
 Irish Act of Union, 96.
 Judicature Act (1873), 81, 133, 252, 301, 309.

Statutes—*continued*.

- Judgments, 246.
 Judicature Act (1875), 81.
 Land Charges (Registration and Searches) Act (1888), 619.
 Land Transfer Act (1875), 363, 683 *et seq.*
 Lands Clauses Consolidation Act (1845), 165, 461, 581.
 Limited Owners' Reservoirs Act (1877), 247, n.
 Limited Owners' Residences Act (1870), *ib.*
 Local Government Act (1888), 91, n., 129, n., 131, 135.
 Local Government (Rural Parishes) Act (1894), 131, 688.
 Locke King's Acts (1854, 1867, 1877), 299.
 Lord St. Leonards' Act, 508.
 Lunacy Act (1890), 450.
 Magna Charta, 146, 147, 151, 165, 184, 193, 195, 200.
 Married Women's Property Acts, 331, 364, 448, 549, 648.
 Merton, Statute of, 11, 67, n., 194.
 Modus levandi Fines, 520.
 Mortmain Acts, 432 *et seq.*
 Municipal Corporations (1882), 126, 136, 445.
 Mutiny Acts, 130, n.
 Naturalization Act (1870), 136, 412, 417, 449.
 New Wills Act, 233, 421, 443, 547 *et seq.*
 North Sea Fisheries, 117, n.
 Of Uses, 266, 328, 352, 504, 546, 563.
 Parish Councils (1894), 123, 125, 431.
 Patents, Designs, and Trade Marks Act (1883), 571.
 Petition of Right, 166.
 Prærogativa Regis, 67, n.
 Prayer Book Act (1871), 88, n.
 Prescription Act (1832), 62, 629, 634 *et seq.*
 Protestant Religion, 88, n.
 Queen Anne's Bounty, 431.
 Quia Emptores, 198, 229, 428, 441, 443, 458.
 Real Property (Amendment) (1845), 227, 279, 308, 315, 322 *et seq.*, 438, 449, 457, 460, 461, 476, 478, 479, 480, 483, 484, 490, 491, 492, 502, 503.
 Real Property Limitation Acts (1833, 1874), 298, 306, 477, 478.

Statutes—*continued*.

Redistribution of Seats Act (1885),
85, 130, 131, 135.
Rents, 621.
Representation of the People Act
(1884), 85.
Revision (Statutes) Act (1888),
66, n.
Riots Compensation, 128, n.
Scotch Act of Union, 86.
Settled Estates Act (1877), 247,
260, 271, 450, 451.
Settled Land Act (1882), 247, 260,
271, 443, 451, 581, 656, 668.
Settled Land Act (1884), 656, 661,
679.
Settled Land Act (1887), 656.
Settled Land Act (1889), 656, 668.
Settled Land Act (1890), 279, 656,
661, 665, 668.
Short Titles Act (1892), 67, n.
Small Holdings, 687.
Stamp Acts, 455, n.
Sturges Bourne's Act, 122.
Submarine Telegraphs Act, 117, n.
Territorial Waters Jurisdiction
Act (1878), 117, n.
Treasons, 69.
Trustee Act (1850), 359, 417.
Trustee Act (1888), 406, 649.
Trustee Act (1893), 359, 361, 363,
413, 417, 450, 648, 649.
Uniformity, Acts of, 88.
Universities Tests Act (1871), 88, n.
Uses, 266, 328, 352, 504.
Vendor and Purchaser Act (1874),
363, 644, 681.
Voluntary Conveyances (1893), 468.
Westminster, i., 189, 195, 206.
Westminster, ii., 237, 302, 428.
Wills (old) Act, 546.
Yorkshire Registries Act (1884),
681.

Statutory mortgage, 642.

Staundeforde on criminal law,
references to, 56.

Stint, common without, 600.

Stipendiary estates, 174.

Stipes, 377.

Stirpes,
succession per, 208, 383.

Stock Exchange,
usages of, 61.

Streets, 664, 669.

Stocks of descent, 382, 383.

Straits Settlements,
Acts relating to, 106, n.

Streams, 606.

Strict settlement, 321.

Study of the Law, 1.

Sturges Bourne's Act, 122.

Sub-headings,
of statute, 75.

Subinfeudation, 174.

Subscription,
to a deed, 463, 464.
to a will, 562.

Subsequent condition, 291, 295.

Subsisting terms, 286.

Substituted security, 678.

Succession,
per stirpes, 208, 383.

Succession duty, 695 *et seq.*
double, 697.
additional, 699.

Successor, 695.

Successors, 426.

Sufferance,
estate at, 284.

Suffragan bishops, 118 n.

Suit and service, 180.

Sulpitius,
reference to, 5, 6.

Sunset,
payment before, 623.

Superior lease, 652.

Superstitious uses, 431.

Supreme Court of Judicature, 81.

Supreme power, 26.

Sur cognizance,
de droit come ceo, &c., 522.
de droit tantum, 523.

Sur concessit fine, 523.

Sur don, grant, et render, fine, *ib.*

Surrender,
 nature of, 488.
 may be by operation of law, 489.
 express, must be by deed, 490.
 of outstanding terms, 286—288.
 of renewable leases, 490.
 under Settled Land Acts, 658,
 671.
 of copyhold, 581, 582 *et seq.*
 conditional, 586.
 to the use of will, 588.
 to bar entail, 589.
 to pass copyholds of married
 woman, 589, 590.

Surrenderee,
 and surrenderor, 583.

Survey of Great Britain, 86, n.

Survivorship, 331.

Suspension of Habeas Corpus Act, 149.

Symbolical delivery, 475.

Syngrapha, 454.

T.

Tails—see ENTAILS.

Tallage, 165.

Taltarum's case, 242.

Tasmania,
 Acts relating to—see VAN DIE-
 MAN'S LAND.

Taxation,
 of colonies, 104.

Taxes, parliamentary, 165.

Tenant,
 at sufferance, 284.
 at will, 283.
 by copy of court roll, 584.
 by elegit, 302.
 by knight service, 188.
 by the curtesy, 257, 575.
 copyhold, 218.

Tenant—*continued.*

 for life, 249, 656.
 for years, 273.
 from year to year, 280.
 holding over, 285.
 in antient demesne, 220.
 in common, 339.
 in dower, 260.
 in fee, 229.
 in frankalmoign, 222.
 in tail, 236.
 after possibility of issue extinct,
 256.
 joint, 328.
 pur autre vie, 249.
 to the præcipe, 528.

Tenant for life,
 under Settled Land Acts, 656.

Tenant right, &c., 222, n.

Tenement, 170.

Tenements, varieties of,
 frank tenements, 186.
 villein tenements, *ib.*

Tenendum,
 of a deed, 458.

Tenures,
 varieties of, 185.
 free or base, 186.
 certain or uncertain, *ib.*
 perfect and imperfect, 242.
 enumeration of particular,
 by cornage, 200.
 by divine service, 222.
 copyhold, 187, 218.
 customary, 218.
 in burgage, 209.
 in capite, 185.
 in chivalry, 187.
 in frankalmoign, 222.
 in grand serjeanty, 199.
 in petit serjeanty, 208.
 socage, 186.
 villein, *ib.*

Termor, 277.

Term or time, 278.

Term of years, 273.
 enlargement of, into fee simple,
 286, 288.

Terms attendant,
 on the inheritance, 286—288.

- Terms, long, 277.
 cesser of, 286.
 enlargement into fee simple, 288.
 extinguishment of, 287.
- Territorial divisions,
 of England, 118.
- Territorial Waters Jurisdiction Act
 (1878), 117, n.
- Testament, 161—see DEVISES.
- Testator,
 capacity to be, 545.
- Teste of a deed, 463.
- Thanet, Isle of, 98.
- The New Wills Act, 233, 421, 443,
 547 *et seq.*
- Thellusson's case, 516.
- Theobald, 10.
- Theodosian code, 39.
- Things,
 real, 167.
 personal, *ib.*
- Third toll dish, 265.
- Threats, 142.
- Three miles limit, 117.
- Tidal river, 616.
- Timber,
 sale and cutting of, 671, 672.
 on copyholds, 576, 594.
- Time,
 computation of, 274.
- Tithes, 118, 119.
- Tithing, 125.
- Title,
 absolute, 683.
 indefeasible, 682.
 qualified, 684.
 possessory, 683.
 judicial, 692.
 abstract of, 644.
 Act to facilitate proof of, 692.
 by act of law, 366.
 by act of party, *ib.*
 by descent, *ib.*
- Title—*continued.*
 by escheat, 407.
 by purchase, 366.
 declaration of, 682, 692.
 for last forty years, when to be
 shown, 644.
 in general, 365.
 of nobility, 381, 382.
 of statute, 67, n.
 registered, 692, 693.
 to corporeal hereditaments, 365
 et seq.
 to crown, 382, 383.
 to incorporeal hereditaments, 626
 et seq.
 unity of, 329.
- Title deeds,
 custody of, 642.
 production of, 646, 647.
- Tobago and Grenada,
 constitutions relating to, 106, n.
- Tobago and Trinidad, *ib.*
- Tolls, 610.
- Tortious feoffment, 437, 438, 478.
- Torture, 146.
- Town,
 definition of, 125, 126.
- Towns, corporate, 126.
- Towns being counties—see COUNTY OF
 A TOWN.
- Trade usages, 60.
- Training to arms, 154.
- Transfer, right of, 161.
- Transfer of Land Act (1875), 363, 683
 et seq.
- Transportation, 151.
- Treason,
 corruption of blood in, 199, 413.
 law as to forfeiture for, 360, 417.
- Treasury, consent of, 445.
- Tribonian, 39.
- Trinidad, 106, n.
- Triens, 261.

Trinoda necessitas, 223.

Trithing, 129.

Trust, *cestui que*, 361.

Trust estate, 357.

Trust of personal chattels, 357.

Trustee,
 attainder of, 360.
 bankruptcy of, 361, n.
 capacity to be, 349.
 conviction of, 360, 361.
 devise to, 557.
 dying intestate and without heir,
 359, 360.
 his estate in the land, 345 *et seq.*
 under Intestates' Estates Act
 (1884), 363.
 statutory provisions with regard
 to, 359, 363.
 to preserve contingent remainders,
 321.

Trustee Act (1850), 359, 417.

Trustee Act (1888), 406, 649.

Trustee Act (1893), 359, 363, 413,
 648, 649.

Trustees of settlement, 674.

Trusts,
 active, 357.
 cognizable in equity, 80, 356.
 contingent remainders in, 361.
 curtesy in, 362.
 declared, 358.
 dower in, 362.
 escheat of, 363.
 execution against, 362.
 executory, 358.
 express, *ib.*
 forfeiture of, 360.
 how limited, 361.
 how created or assigned, 362.
 implied, 358.
 in equity, 357.
 origin of, *ib.*
 passive, *ib.*
 resulting, 358.
 special, 357.
 to attend inheritance, 286—288.
 to preserve contingent remainders,
 321.

Turbary,
 common of, 600.

Turks Islands,
 annexation of, 106, n.

Twelvemonth, 275.

Twelve Tables, 38, 545.

Two years' improved value, 219.

U.

Ultimæ necessitatis,
 senatus consultum, 149.

Unadmitted surrenderee, 583.
 or devisee, 588.

Uncertain services, 186.

Uncle in descents, 389, 390.

Underground water, 607.

Underleases,
 sales of, 645.

Underlessees,
 emblems of, 254.
 on surrenders of leases, 490, 491.

Undertaking as to title-deeds, 642.

Undertakings, public, 165, n.

Uniformity, Acts of, 89.

Uninhabited country, 102.

Union,
 with Ireland, 96.
 with Scotland, 86.

Unity of seisin, 637.

Unity of title, 329.

Universities of Cambridge and Oxford,
 8, 14, 17, 433.

Universities Tests Act (1871), 88, n.

University of London, 17.

University, Victoria, 18, 435.

Unwritten law, 43.
 nature of, *ib.*
 modifications of, 44.
 added to, by Norman law, 46.
 equity is, 79.
 largely composed of local customs,
 47—see CUSTOMS.

Usages of trade, 60.

Use, cestui que, 348.

Use upon a use, 355.

Uses,
 charitable, 431.
 contingent, 351.
 curtesy in, 257.
 distinguished from trusts, 344.
 dower in, 351.
 executory, 509, 510.
 feoffee to, 348.
 feoffment to, 347, 498.
 grant to, 503.
 history and origin of, 345.
 implied, 348.
 in esse, 351.
 in futuro, *ib.*
 in possibility, *ib.*
 manner of creating, 348.
 nature of, 344.
 properties of, 346.
 reduplication of, 355.
 resulting, 348.
 secondary, 510.
 shifting, *ib.*
 springing, 509.
 superstitious, 431.
 what is capable of being held to,
 347.
 what may be conveyed by, *ib.*
 what the statute executes, 353.
 who capable of holding to, 349.

Uses, seisin to, 496.

Uses, Statute of,
 provisions of, 266, 352.
 conveyances under, 518 *et seq.*

Usque ad filum aquæ, 606.

Usus fructus, 345.

Ut de coronâ, 185, 230.

Ut de honore, *ib.*

Uterinus, frater, 396.

Ut liberum tenementum, 303.

Ut res magis valeat,
 quam pereat, 470.

V.

Vacant possession, 162.

Vacarius, 11.

Vadium,
 mortuum, 296.
 vivum, 296.

Valor maritagii, 192, 206.

Valuable consideration, 468.

Value of marriage, 192, 206.

Value, recompense in, 531.

Valuers, inclosure, 604.

Vancouver's Island, 106, n.

Van Dieman's Land, *ib.*

Vassal, 174.

Vaughan's Reports, 55.

Ventre sa mère,
 children in, 141, 141, n.

Verba fortius accipiuntur, 471.

Verba intentioni debent, 469.

Vested remainder, 315.

Vesting,
 of legal estate, 376.

Vesting order, 360.

Vestry, 122.

Vestry clerk, 124.

Vetera statuta, 66, n.

Viccomes, 128.

Vicinage,
 common because of, 598.

Victoria,
 Acts relating to colony of, 106, n.

Victoria University, 17, 18, n.

Vill, 127.

Villanum socagium, 187, 204.

Villein socage, 187, 204, 220.

Villeins,
 origin of, 212.
 varieties of, 213.
 enfranchisement of, *ib.*
 develope into copyholders, 215,
 216.

Villenage,
 pure, 186, 213.
 privileged, 187, 220.
 extinction of, 215.

Vindictory sanction of laws, 35.

Viner's abridgment, 56.

Virtual disclaimer, 438.

Vivo vadio,
 estate in, 296.

Void and voidable, 446, 467.

Voluntary deed, 468.

Voluntary enfranchisements, 593.

Voluntary waste, 251, 279, 283—see
 WASTE.

Volunteers, 153, n.

Vouchee, common, 528.

Voucher to warranty, 527.

W.

Waiver,
 of condition, 295.
 of escheat, 417.

Wales,
 subjugation of, 83.
 members for, 84.
 courts of, *ib.*
 assizes for, *ib.*

Wales, Prince of, 83.

Wapentakes, 128.

Wardholding, 202, n.

Wards and liveries,
 court of, 191.

Wardship,
 in chivalry, 189.
 in copyholds, 218.
 in socage, 205.

Warrant,
 arrest on, 147—149.

Warranty, 459.
 collateral, 460.
 lineal, *ib.*

Warren, fowls of, 615.

Warren, free, *ib.*

Waste,
 legal, 251.
 equitable, 252.
 voluntary, 251.
 permissive, *ib.*
 under Judicature Acts, 252.
 under Settled Land Act, 674.
 in copyholds, 576.
 by tenant at will, 283.
 for years, 279.
 for life, 251.
 impeachment of, 252.

Waste lands,
 of manor, 212.
 grant of, 587.
 consents to, 588, 593.
 inclosure of, 602 *et seq.*

Waste, year, day, and—see YEAR,
 DAY, AND WASTE.

Water, 161, 168, 606, 607.

Watercourse, 606, 636.

Way,
 rights of, 604, 636.
 of necessity, 605.

Weather-tight, 282.

Week to week,
 tenant from, 280, n.

Weirs, 616.

Wells, underground, 607.

Welshmen,
 equality of, 84.

- West Indies,
Acts relating to, 106, n., 108.
- Westminster,
formerly a bishop's see, 127, n.
- West-Saxon lage, 45.
- White rents, 620.
- Whole blood, 393.
- Widowhood,
estate during, 250.
- Widows' fund, 115, n.
- Wight, Isle of, 98.
- Will, estates at, 283.
- Will of the lord, 217.
- Wills, statute of, 233, 421, 443, 547
et seq.
- Wills, 161, 233, 544 *et seq.*—see DE-
VISES; RESIDUARY DEVISE.
- Windward Islands, 106, n.
- Witnesses,
to a deed, 463, 464.
to a will, 550, 552.
- Writ,
close, 568.
of covenant, 520.
of deceit, 589.
of elegit, 302.
of ne exeat regno, 150.
of partition, 333.
of right, 221.
- Writs and orders,
affecting land, registry of, 688.
- Written conveyances, 475.
- Written laws,
are statutes, 67.
varieties of, 68—see STATUTES.
- Wrongs, 138 *et seq.*
- Y.
- Year, 274.
- Year and a day,
in fines, 524, 525.
in forfeitures, 415.
- Year, day, and waste, *ib.*
- Year, tenancies by—see YEARLY TEN-
ANCY.
- Year to year,
tenancies from, 280.
- Year-books, 54.
- Yearly tenancy, 280.
- Years, estates for, 273.
- Yelverton's Reports, 55.
- Yeomanry, 153, n.
- York,
customs of, 59.
- Yorkshire,
registration of deeds in, 681.
- Yorkshire Registries Act (1884), *ib.*



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